Federal Ministry for the
Environment, Nature Conservation,
Building and Nuclear Safety

alpenkonvention · convention alpine
convenzione delle alpi · alpska konvencija
Alpine Convention
German Presidency 2015 - 2016

Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety, G II 1, D-11055 Berlin, Germany

Ms Fiona Marshall

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

Switzerland

TEL +49 - (0) 3018 - 305 - 2253/2267
FAX +49 - (0) 3018 - 305 - 3393

GII1@bmub.bund.de
www.bmub.bund.de

Communication to the Aarhus Convention Compliance Committee concerning compliance by Germany (Germany PRE/ACCC/C/2015/125)

- Consideration of the preliminary admissibility

Berlin, 20.03.2015

Dear Ms Marshall,

We are grateful for the submission of this new communication of 19 February 2015 during the consideration of the preliminary admissibility by the Compliance Committee.

We would like to take this opportunity to inform the Compliance Committee of some points that might be of relevance concerning the consideration of the preliminary admissibility of communication PRE/ACCC/C/2015/125 in the forthcoming session of the Committee.

1. Status of the communicant as a public authority

It is the view of Germany that the communication should not be regarded as admissible in accordance with paragraph 20 of the annex to decision I/7 because the communicant in this case is a German municipality. In Germany, municipalities are part of the national state administration and act as government on the local level. Therefore the communicant is a public au-

...

thority according to the Convention, but not a member of the public as defined in the Convention and required for the triggering of a compliance procedure under the Convention.

A communication may be brought before the Aarhus Convention Compliance Committee by "*members of the public*" (see Article 15 of the Convention). According to Article 2, paragraph 4 of the Convention the "*public*" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups. The definition of *"public"* and as well of *"public concerned*", as indicated in the communication, is designed to include all actors other than "public authorities".

The Communication was submitted by the Altrip municipality. A municipality fulfils all criteria of the definition of "*public authority*" as defined by Article 2, paragraph 2 of the Convention:

"Public authority" means:
(a) Government at national, regional and other level;
(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;".

A municipality is a local authority. It is part of the democratically elected public power (see e.g. Decision of the German Federal Constitutional Court, BVerfGE 73, 118, 191). Municipalities have their own responsibilities and they have responsibilities transmitted by the federal state. The fact that municipalities have to perform administrative functions and hold a constitu-

tional right to self-government does not make them a member of the "*public*". There are a number of competences which distinguish the municipality of Altrip from a member of the public, e.g.:

- In areas of their responsibility they can establish community statutes.
- They are the local planning authority. They decide about the development or use of land in the municipality's territory.
- They provide public services. They are responsible for all local services such as roads, waste service, social service, schools and construction.
- They have the right to levy taxes and have the authority to charge for many services.

In conclusion, a municipality acts as government body on the local level. The municipality of Altrip is therefore a public authority as defined in the Convention and cannot be regarded as a "*member of the public*".

This distinction between public and "public authority" is made by the Aarhus Convention on purpose. The Convention grants rights to the public which they can claim from the public authorities. This is already stated by the preamble of the convention, whereby the public expresses concerns which the public authorities should take account of:

"Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."

Also, the UN ECE Aarhus Implementation Guide makes note of this fundamental distinction. In its Introduction is laid down:

"The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation."

The inadmissibility of a communication submitted by a public authority has been already stated by the Compliance Committee in case ACCC/C/2013/97 (Austria). In this case the communication was determined inadmissible because it was submitted by an organ of the state. This also applies to the communication by the Municipality of Altrip, which is a government body at the local level.

The same reasoning is stated by the responses of the Parties concerned in the communications ACCC/C 2014/100 (United Kingdom) and ACCC/C/2014/101 (European Union), where inadmissibility was also requested due to the fact one of the communicants is a public authority.

The purpose of the Aarhus Convention is to give procedural rights to the public. Therefore, a public authority should not be allowed to bring communications against a Party. Public authorities are rather subject to obligations under the Convention.

2. Domestic Remedies

Even if the text of the communication does not mention this clearly, the background of the communication is an ongoing court case initiated by the municipality of Altrip among others. This court case concerns a decision approving plans to construct a flood retention scheme covering 320 hectares of a former Rhine floodplain.

The Committee is aware of this court case, because it has already been discussed during the deliberations of the Committee concerning the compliance of Germany in the compliance procedure ACCC/C/2008/31.

The current status of this ongoing court case is as follows: since the judgement by the European Court of Justice on 7 November 2013 (Case C-72/12) in a preliminary ruling procedure that was requested by the Federal Administrative Court in Germany, the case is still pending before Federal Administrative Court in Germany (BVerwG 7 C 15.13). There is no indication so far as to when a final judgement can be expected.

Nevertheless, in relation to case PRE/ACCC/C/2015/125 the conclusion must be drawn that the national remedies have not yet been exhausted. According to paragraph 21 of the annex to decision I/7, the Committee will have to take this into account.

3. Preliminary observation on the substance of the communication

Despite our view that this communication should not be regarded as admissible, we would like to make some brief and preliminary remarks on the substance of the communication:

Regarding the substance of communication PRE/ACCC/C/2015/125 Germany is of the opinion that the several allegations made against the national legal system are unfounded.

Some allegations ignore the Maastricht recommendations, some make reference to the wrong provision of the Convention (e.g. to Article 9, paragraph 2, instead of Article 9, paragraph 3, with consequences for the correct legal

conclusions) and some have already been discussed intensively during the compliance procedure in case ACCC/C/2008/31.

However, several allegations of communication PRE/ACCC/C/2015/125 are linked to provisions in domestic legislation that provide for a possible preclusion of such arguments during an environmental appeal that have not been raised by a claimant during the public participation procedure, but could have already been raised at this time.
The accordance of these provisions of German legislation with the requirements of the provisions on access to justice in the Directives on EIA (Article 11 of Directive 2011/92/EU) and on Industrial Emissions (Article 25 of Directive 2010/75/EU) is already currently under examination by the European Court of Justice (ECJ) in an ongoing court case (Case C-137/14 – Commission ./. Germany). The hearing in this case took place on 12 March 2015 in Luxemburg. The opinion of the Advocate General will be issued on 21 May 2015. According to the usual length of proceedings, a final judgment might be expected at the end of 2015 or early in 2016.

If the Committee determines the communication PRE/ACCC/C/2015/125 to be admissible, Germany would therefore suggest suspending the procedure before the Compliance Committee until the ECJ has made its decision. Taking into account the legal concept of paragraph 21 of the annex to decision I/7, it would make sense to wait for the decision of the ECJ, as its rulings are binding for the German government.

4. Determination by the Compliance Committee

If the Committee determines the communication PRE/ACCC/C/2015/125 admissible, Germany would also be very thankful for an indication by the

Committee at the same time, whether all or only specific allegations of the communication will be examined further during the Compliance Procedure. This would make it possible for any further statement by Germany to focus on the relevant allegations only.

Yours sincerely,

For the Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety

Matthias Sauer
Head of Division