Mr. Chairman,
Members of the Compliance Committee,
Representatives of the communicant and the observer,
Ladies and Gentlemen,

In the name of the Government of the Federal Republic of Germany, I wish to express my gratitude for the invitation to attend the 61st meeting of the Aarhus Convention Compliance Committee.

We welcome the opportunity to respond to the assessment concerning the implementation of the Aarhus Convention in the Federal Republic of Germany set out by the communicant in its communication and to discuss it with the Committee and the communicant.

Mr. Chairman, distinguished members of the Committee: Case 137 is in essence about the question of whether a Party to the Convention may have a provision in its national legislation under which an environmental organization must have a democratic internal structure in order to exercise its rights under Article 9 para. 2 of the Convention.

The Federal Government believes that the answer to that question is yes. National legislation which requires environmental organizations to have a democratic internal structure, that is to provide free access to all persons to become members and enjoy full voting rights, is consistent with the Convention.

The Convention does not require that Parties extend rights under Article 9 para. 2 of the Convention to all members of the public. With regard to non-governmental organizations, Parties may make the rights deriving from the Convention conditional upon "meeting any requirements under national law". Germany has availed itself of this stipulation in a manner that is in compliance with the Convention.

With regard to the abovementioned Article 9 para. 2 of the Aarhus Convention, the Federal Government would like to point out that the communicant also cited the provision contained in Article 9 para. 3 in its most recent observations. This goes beyond its communication of February 2016. The Federal Government is presuming

for the time being that this is more an oversight than an expansion of the communication – which the Federal Government considers would be inadmissible –, and requests that the Committee inform it accordingly should this not be the case.

The Federal Government addressed all the arguments of the communication in great detail in its written comments of 3 January 2017, in which it set out its legal opinion. This also relates to the admissibility of the communication. We maintain that we have doubts as to its admissibility. The communicant has in fact not taken up the domestic remedies before the German courts that are open to it, and that are available. It is our opinion that the Committee should take this into account according to its rules of procedure.

Over the next minutes, I shall address the following three points in relation to the substance of the communication:

Firstly, a brief statement of the facts regarding the number of the recognized environmental organizations in Germany;

Secondly, the compatibility of the criterion of internal democracy with the Aarhus Convention;

Thirdly, the compatibility of the provisions on recognition with the Convention in other respects.

Firstly: On the statement of the facts

- Currently, **327** environmental organizations are recognized in Germany. These are 15 more than at the time of the German comments made in January 2017. The UBA has issued 4 new recognitions, including one recognition of a Dutch environmental organization. The recognition of a second Dutch eNGO is imminent. As regards recognition by the Länder, a new survey among them has shown that they have issued 12 new recognitions since January 2017. One eNGO disbanded and lost its recognition.

- We would like to emphasize again that these 327 recognized environmental organizations do not include only smaller environmental organizations, but also some of the largest environmental organizations in Germany. Let me give you 2 examples. The first example is The *Nature and Biodiversity Conservation Union (*NABU). At the end of 2016, it had nearly 600,000 members. This number does not even include those persons who are merely promotional members. Second example: *Friends of the Earth Germany* (BUND) also has almost a similarly high number of members, with nearly 400,000 members. Moreover, it is supported financially by another 150.000 donors. This illustrates that the size of a *Vereinigung* (organization) is not an indication at all of whether or not it will find it difficult to satisfy the prerequisites for recognition.

- The survey among the Länder and the Federal Environmental Agency has shown: Most – but not all – environmental organizations that are recognized in Germany are organized in the legal form of a registered association (*eingetragener Verein*). [e.g. Northrhine-Westphalia: recognition of the then "citizens' initiative for the preservation of the Ahm as a nature and recreational area"].

Secondly, I will now turn to the central legal aspect of the communication:

- The communication centers on the question of whether the German law may make the exercise of the rights of environmental organizations under Article 9 para 2 of the Convention conditional upon the requirement of a democratic internal structure. This stipulation, also referred to as the criterion of internal democracy, means: Any person must have the opportunity to become a member of the *Vereinigung* and to gain full voting rights. This precondition is regulated in section 3, subsection (1), sentence 2, No. 5 of the Environmental Appeals Act (UmwRG).

- This provision is consistent with the Convention. This is because the Convention does not by any means require the Parties to grant comprehensive rights under Article 9 para 2 of the Convention to all members of the public. For example, the Convention does not require any *actio popularis* for individual plaintiffs, as this Committee had emphasized in Case 31 concerning Germany. And with regard to non-governmental

organizations, the Parties may make the rights derived from the Convention conditional upon meeting "any requirements under national law". This is set out in Article 2 No. 5 of the Convention.

- Permit me to make two points in this regard. Firstly, I would like to refer to the definition of "the public" in accordance with Article 2 No. 4, to which Article 2 No. 5 then refers: The public is understood by the Convention as "*one or more natural or legal persons, and, in accordance with national legislation or practice,* ***their*** *associations, organizations or groups*". The French version makes it clearer still, and if I may quote again: "Le terme "public" désigne une ou plusieurs personnes phyisques ou morales et, conformément à la legislation ou à la coutume du pays, les associations, organisations ou groupes ***constitués per ces personnes***." In the view of the Federal Government, this definition makes it clear that the Convention assumes that environmental organizations are combinations of individuals – something which particularly does not apply to foundations, as they have no members. Foundations are not combinations of natural or legal persons. They are a collection of assets with legal independence, and in particular are not made up of persons. The communicant, which is a foundation, has no members. It is financially supported by donors, and the communicant refers to these donors inaccurately as "promotional members". Yet, this changes nothing in either legal or factual terms as to the fact that donors they are not members with rights to take part in the will-formation of the organization.

- For clarification: Parties to the Convention are of course free to extend the provisions contained in the Convention to also cover foundations. However, Parties are not under any legal obligation to do so.

- As to the definition of "requirements under national law" in accordance with Article 2 No. 5 of the Convention: The Convention itself does not define this requirement. The Parties therefore have a margin of appreciation when applying this provision. [This is also underlined by the Implementation Guide of the Aarhus Convention.] The limits of this margin of appreciation are derived from the objectives of the Convention and the special role the Convention allots to eNGOs. Thus, national criteria should be:

- clearly defined and based on objective criteria,
- not politically motivated, overly burdensome or unnecessarily exclusionary, and
- consistent with the principles of the Aarhus Convention.

- The Federal Government is convinced that the precondition of internal democracy satisfies these criteria. It is a legally-entrenched, objective criterion that is not politically motivated.
- This stipulation, which applies to every organization, does not suggest any value judgment with regard to the environmental work of, for example, the communicant. It relates solely to the criteria that those organizations must satisfy which are committed to environmental protection in order to exercise rights under Article 9 para 2 of the Convention, in addition to the tasks that they have selected for themselves.
- This criterion is also not unnecessarily exclusionary or overly burdensome. Neither does it entail any administrative effort, nor does it depend on external circumstances, which are partly or entirely beyond the control of the organization. Every organization that is an assembly of persons may satisfy this criterion. And, in particular, it serves a legitimate purpose that is also consistent with the principles of the Convention: Its legitimate purpose is to ensure the legitimacy of environmental organizations, given that environmental organizations, as custodians of the environment, advocate the general public interest.
- Now, what is the rationale behind this? Whoever, in a democratic society, asserts public interests on behalf of all should be able to show such legitimacy for this. In a democracy, legitimacy is communicated through the participation of citizens. This participation is guaranteed when all citizens are at liberty to help shape the performance of tasks and the nature of the performance of those tasks. This participation is expressed through membership and voting rights.
- The German legislature has applied this very consideration to the eligibility of environmental organizations for recognition. All environmental organizations which

welcome as members all individuals who support the goals of the *Vereinigung*, whilst at the same time granting them full voting rights at the general meeting, are therefore sufficiently legitimized to represent the public.

- Hence, the criterion excludes only, and specifically, those organizations from recognition which do not have a democratic internal structure.

- The multiplicity and diversity of recognized environmental organizations in Germany convincingly shows that this criterion is not overly burdensome. The Federal Government would like to reiterate at this point that the communicant would always have been at liberty in the past, and indeed continues to be free, to establish a support association (*Förderverein*), of which it is a member, with a democratic internal structure.

- This approach is furthermore consistent with the principles of the Aarhus Convention. Furthermore, it reflects the Conventions' perception as an instrument of "environmental democracy": Individuals and their organizations are guaranteed rights of participation in environmental decision-making in order to enhance the protection of the environment.

- The Federal Government opines that if this holds true, the Convention consequently allows Parties to make the rights of recognized organizations under the Convention conditional upon whether they themselves offer their members a democratic internal structure, and the right to participate in the decision-making process of the *Vereinigung* without restriction.

Thirdly – on the compatibility of the German provisions regarding recognition with the Convention in other respects

- The Federal Government emphasizes that the provisions for the recognition of environmental organizations are also in compliance with the Convention in other regards. The communicant itself also presumes that the term "*Vereinigung*" (organization) covers all possible types of organizations. The cumulative application of the criteria that are set out in section 3 subsection (1), sentence 2, of the Environmental Appeals Act by no means leads to a situation in which ultimately only

registered associations (*eingetragene Vereine*) or cooperatives are eligible for recognition. The Federal Government is ultimately unable to recognize an additional argument here, over and above the criticism of the criterion of "internal democracy". The Federal Government has already presented written details with regard to the individual requirements for recognition. We will be pleased to answer any questions.

- Permit me however to conclude by highlighting one more point, which the communicant took up in its letter of January 2017 [as well as in the statement that we have just heard], and which it emphasized strongly.

- I refer to the claim that environmental organizations are de facto the "exclusive representatives" of the public that effectively have rights under Article 9, para 2 of the Convention in Germany. With all due respect for the communicant, this is simply incorrect. The communicant goes on to claim that, in light of this exclusivity, discretion would have to be limited with regard to the prerequisites for recognition, namely in such a manner that all environmental organizations that are supported by individuals would have to be eligible for recognition.

- Please permit me to explain why both the premise and the conclusion is flawed in the view of the Federal Government:

- Firstly, environmental organizations are naturally not the "exclusive representatives" of the public concerned. Everyone in Germany has a constitutionally-enshrined claim to legal protection. Each person can therefore take legal action against any act on the part of a public authority that violates his or her own rights. This right is enshrined in Article 19 para. 4 of the Basic Law, the German Constitution. I refer in this context once more to Case 31 concerning Germany and to the statements of the Committee that the Convention does not require any *actio popularis* to be established.

- This means that both individual plaintiffs and recognized environmental organizations have rights under Article 9, para 2 of the convention in Germany. Thus, environmental organizations are not the "exclusive representatives" of the public concerned.

- Secondly, the conclusion drawn by the communicant is also incorrect: The Convention does not require that Parties offer rights under Article 9, para 2 to all environmental organizations which have been chosen for support – be it financial support or other support – by individuals (and hence parts of the public). This would render meaningless the provision contained in Article 2 No. 5 of the Aarhus Convention. This provision particularly allows the Parties (in a specific framework, as explained) to establish prerequisites for the assertion of the rights derived from the Convention.

- In conclusion: The Party concerned has exercised this option afforded to it by the Convention, namely to associate the rights of participation of environmental organizations in particular with the prerequisite that the environmental organization should have a democratic internal structure. In the opinion of the Federal Government, this is in compliance with the Convention.: The provision guarantees the legitimacy necessary in a democratic state for the assertion of the general public interest.

Mr. Chairman, Members of the Committee, many thanks for your attention. We will be very glad to answer any questions that you may have.