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Berlin, 17 April 2018

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Germany in connection with the criteria for environmental organizations (ACCC/C/2016/137)

Dear Fiona,

please find attached the answers to the questions of the Committee concerning the use of domestic remedies of 12 March 2018.

We would be grateful if you confirmed safe receipt by the end of this week.

Yours sincerely,

Christoph Heinrich

Communication to the Aarhus Convention Compliance Committee concerning compliance by Germany in connection with the criteria for environmental organizations (ACCC/C/2016/137)

Dear Mr. Ebbesson,

Dear members to the Committee,

Many thanks for your questions concerning the possibilities of the use of domestic remedies of 12 March 2018 and the extension of the deadline to reply of 27 March 2018.

We briefly would like to recall our statements on the use of domestic remedies in the "Communication" (see page 9, VI.) and the "Reply to the comments of the FRG" (see p. 1, para 2 and page 2, para 1) before answering to your questions.

Question No. 1: Why has your organization not submitted a request for recognition to the competent authority and, if then rejected, challenged the rejection before the domestic courts (see page 6, para. 4, of the Party's response dated 3 January 2017)?

The WWF has not submitted a request for recognition to the German Federal Environment Agency because such a request would definitely be rejected. From a legal perspective, there is no chance of success due to the clear wording of the law. The communicant – clearly meeting all other recognition criteria - can due to the definition of the legal form of a foundation not meet the recognition criterion of having members with voting rights in the general assembly (see approving p. 3, para. 2 and p. 6, para. 5 of the Party's response dated 3 January 2017). The competent recognition authority has no discretion that allows accepting the request. It cannot apply an interpretation contra legem of the provisions at stake. To ask for recognition would only constitute an unreasonable, ineffective and absurd effort since the outcome – the non-recognition - is clear from the start. And the rejection procedure including the mandatory administrative appeal procedure needs to be expected to last very long, too: After the request for recognition by Greenpeace Germany e.V. the administrative procedure took more than 15 months until the decision rejecting recognition was finally received (see p.3, para 4 of the statement of observer of 8.2.2017). Already under these circumstances the request for recognition does not seem to be very effective.

Moreover, the German domestic court system does not provide for sufficient legal remedies to challenge the decision by the competent recognition authority:

The administrative courts are bound by the clear wording of the law. Courts have no possibility to change the law or to apply an interpretation contra legem of the provisions at issue either.[1] And as there is no provision under European Law concerning express recognition criteria for environmental organizations the domestic courts cannot refer to the principle of "primacy of application of European law" but are bound by the national recognition criteria.

In Germany, only the Federal Constitutional Court is empowered to repeal a law or certain parts of it as unconstitutional. Private persons and private legal persons have the possibility only after the exhaustion of all national remedies to seize the Federal Constitutional Court on grounds of violation of national fundamental rights[2] when they meet the high requirements for admissibility.[3] This [Court] is, however, limited to the review of

[1] Art. 20 para 43, Basic Law (German Constitution)
[2] Art. 93 para. 1 No. 4a Basic Law.
[3] From 1991 until 2017 3908 constitutional complaints against decisions of the Federal Administrative Courts have been brought to the Federal Constitutional Court. Out of these, only 3 % have been successful: Bundesverfassungsgericht, Jahresstatistik 2017, p. 25 (avalaible in German at: http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2017/statistik_2017_node.html)

violations of national fundamental rights.[4] In that regard, a principle of equality is entrenched in art. 3 Basic law. However, it is only infringed in cases where the discrimination by the legislator is "arbitrary", that is without any objective reason. Already the different legal structures "registered" association (*eingetragener Verein*) and foundation (*Stiftung*) would be a sufficient distinguishing criterion to justify discrimination under national law. Additionally the Federal Constitutional Court does not assess the interpretation of international treaties or the interpretation of European law by the legislator and is bound exclusively by the application of national fundamental rights.

Therefore, under German Law the decision of the German legislator not to recognize environmental organizations constituted in the legal form of a foundation cannot be effectively challenged before the domestic courts.

2. Can you provide the Committee with any decisions of domestic courts concerning appeals brought by other environmental organizations constituted in the legal form of foundations against a competent authority's rejection of a request for recognition?

After the research of publically available jurisprudence no decisions of domestic courts exist that concern appeals brought by environmental organizations constituted in the legal form of foundations. The courts have ruled in many decisions on the recognition criteria laid down in § 3 Environmental Appeals Act.[5] But neither on the federal level nor on the "Länder" level courts have yet dealt with appeals brought by other environmental organizations constituted in the legal form of foundations.

And as to the knowledge of the WWF, no foundation has ever made a request for recognition. The clear wording of the law, the grounds of the law - explicitly excluding foundations, (see communication of 10.02.2016, page 10, para. 3 of the) in combination with the lack of effective domestic remedies prevents such a futile request.

3. Please provide your views on the Party concerned's submission concerning the possibility to obtain a preliminary ruling from the Court of Justice of the European Union (CJEU) (see page 3, para. 2, of the Party's comments of 1 March 2016).

The possibility to obtain a preliminary ruling from the CJEU is no effective remedy under German law. And especially for the question of recognition criteria for environmental organizations it is merely a "theoretical" option.

Under German administrative procedural law the parties to an administrative court action cannot apply any legal means in the action itself to submit a legal question to the CJEU: In none of the national stages of appeal (Administrative Courts, Higher Administrative Courts, Federal Administrative Court) any legal means exist for the parties to request the preliminary ruling from the CJEU within the court actions.

In the first two instances it would under all legal aspects be at the sole discretion of the courts to refer a question to the CJEU. Only the Federal Administrative Court - as court of last resort - is bound by art. 267 para. 3 TFEU and the standards set in ECJ decision of 06.10.1982, CILFIT, 283/81, Slg. 1982, 3415. But here the parties still have no direct means to initiate a preliminary ruling of the CJEU.

Only after the Federal Administrative Courts final decision the parties may lodge a constitutional complaint based on the deprivation of the legally competent judge (Art. 101 para. 1 Basic Law) to claim that art. 267 para 3 TFEU and the CILFIT standards were not sufficiently acknowledged. In practice this appeal is limited due to the Constitutional Courts own definition as not being the "supreme-submission-control-court" ("oberstes

[4] Art. 93 para. 1 No. 4a Basic Law.
[5] We would be happy to provide you with further information if these decisions are of interest.

Vorlagenkontrollgericht"). Hence it only reviews the decision of the courts of last resort not to refer in a very limited manner.[6] Moreover, if the constitutional claim is successful the Constitutional Court will refer the case back to the court of last resort for a new decision and not decide on the question of submitting itself.

For the appeal of the foreseeable rejection of the request at the Federal Environment Agency the theoretical stages of appeal for the communicant would be the following: Legal actions could be initiated at the Administrative Court of Halle as the court of first instance. The court of second instance would be the High Administrative Court in Magdeburg and the court of last instance the Federal Administrative Court. In all of these instances the communicant could not initiate the referral to the CJEU. During the many years[7] of proceedings he would entirely depend on the discretion of the judges. And the practice of the German administrative courts clearly shows, that the possibility to obtain a preliminary ruling by the CJEU is highly hypothetical when legal questions on access to justice in environmental matters and their compatibility with EU Law and the provisions of the Aarhus Convention are at stake: Since 2006 they have applied in many decisions the provisions of the older versions of the Environmental Appeals Act - which were clearly contrary to European Union Law and the provisions of the Aarhus Convention[8] - without referring a question for preliminary ruling to the CJEU.

Moreover the restrictive approach on recognition criteria has had a long legal tradition under German law (as highlighted in the Party's response dated 3 January 2017 p. 16, para. 4 – p. 18 end). The recognition criterion of the internal democratic structure was not rejected by high instance judgements[9] and is - still - supported by the predominant opinion amongst legal scholars:[10]

> *„The jurisprudence is predominantly of the opinion that the recognition criteria of § 3 para. 1 Environmental Appeals Act – including the internal democratic structure is in accordance with Art. 9 para. 2 Aarhus Convention and the Law of the European Union". (Original in German: In der rechtswissenschaftlichen Literatur wird jedoch überwiegend davon ausgegangen, dass die für eine Anerkennung von Umweltverbänden nach § 3 Abs. 1 UmwRG bestehenden Anforderungen – einschließlich der demokratischen Organisationsstruktur – dem Art. 9 Abs. 2 AK und dem Unionsrecht entsprechen.)"*[11]

Taking this into consideration, the possibility to obtain a preliminary ruling from the Court of Justice of the European Union by request of a German administrative Court is no sufficient and effective means of redress for the communicant.

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[6] Federal Constitutional Court, decision of 28.01.2014 – 2 BvR 1561/12, 2 BvR 1562/12, 2 BvR 1563/12, 2 BvR 1564/12, NVwZ 2014, p. 646, 65.

[7] e.g. statistically only the first and second instance in administrative actions together usually took - as an average number - 38 month in 2016 (https://justiz-und-recht.de/wie-lange-dauert-ein-verwaltungsgerichtliches-verfahren-eine-prognose-fuer-das-jahr-2016-sieger-und-verlierer-2014/#Durchschnittliche_Gesamtdauer_von_Hauptsacheverfahren_ueber_die_1_und_die_2_Instanz_wenn_die_2_Instanz_durch_Urteil_entschieden_wird);

[8] amongst others: CJEU, Trianel, C-115/09, of 12.05.2013; CJEU, ALTRIP, C-72/12 of 07.11.2013; decision ECE/MP.PP/2014/CRP.4, V/9 Germany.

[9] BVerwG, decision of . 06.12.1985 – 4 C 55. 48, BVerwGE 72, 277 (280 f); and see the judgment mentioned in the Party's response dated 3 January 2017 p. 17 para. 2.

[10] eg. Hoppe/Beckmann, Gesetz über die Umweltverträglichkeitsprüfung: UVPG, Kommentar, 4. Auflage, 2012, § 3 UmwRG para. 58; Gärditz, Verwaltungsgerichtsordnung mit Nebengesetzen, Kommentar, 1. Aufl.2013 § 3 UmwRG para. 32; Bunge, Umweltrechtsbehelfsgesetz, Kommentar, 1. Auflage, Berlin, 2013, § 3 UmwRG para. 22 ff.

[11] Schmidt, Stracke, Wegener, Zschiesche, The legal debate on access to justice for environmental NGOs, Dessau/Roßlau, 2016 p. 95 with further citations.

The futile, expensive and very lengthy process from the recognition request to the different stages of appeal is without realistic chances of success before the national courts - due to the clear wording of the law – and the - due to the predominant opinion amongst scholars and courts – only theoretical option of a preliminary ruling of the CJEU deprive the communicant for many more years of his right to represent his 500.025 promotional members in environmental matters as foreseen in the Aarhus Convention.

Finally we want to bring to your attention the following background information which is of importance for our communication as well:

1. With the amendment of the "Law aligning the Environmental Appeals Act and other provisions to stipulation of European and International Law"[12] the legislator has responded to decision V/9 concerning Germany's non-compliance with the provisions of Art. 9 para.2. and 9 para.3. AC - as announced in our "Reply to the comments of the FRG of 27 January 2017" (see p.2., para 2) - only by extending standing for acknowledged environmental organizations. No other members of "the public" as defined in Art. 2 para. 4 AC have been enabled to invoke the provisions of Art. 9 para. 2 and para. 3 AC in the German national legal order.

2. The action by "Greenpeace e.V". against Germany at Halle/Saale Administrative Court against its non-recognition as an acknowledged environmental association (see page 6, para. 5, of the Party's response of 3 January 2017) has been suspended on 5 March 2017 by mutual agreement[13] between "Greenpeace e.V. Germany" and the "German Federal Environment Agency" – the competent recognition authority. The agreement was reached to implement the view of the Committee in this communication on the recognition criteria in Germany in the national action.

3. A legal comparison concerning the role of the formal structure of e-NGOs for their access to the courts in the national legal orders of Germany, France, the United Kingdom, Italy, Sweden and Poland, published in 2017, has shown the following: In France, the United Kingdom, Italy, Sweden and Poland

   > "*there do exist requirements for the recognition of e-NGOs which either partly or even largely correspond to the German requirements inter alia concerning their formal structure. But unlike in Germany, e-NGOs that are not recognized regularly, normally still have access to the courts due to principles established in the national case-law. For this reason, the organizational structure of e-NGOs is either not or only in a limited manner relevant for their access to the courts. In particular, in none of the compared countries a democratic organizational structure of e-NGOs is mandatory for their legal standing*."[14]

[12] Amendement of the Environmental Appeals Act, 23 August 2017 (BGBl. I S. 3290).
[13] (§ 173 Law on Administrative Law Proceedings, § 251code of civil procedure.
[14] Schmidt/ Stracke/Wegener/Zschiesche, The legal debate on access to justice for environmental NGOs, Dessau/Roßlau, 2016, p. 34 (available at: https://www.umweltbundesamt.de/publikationen/die-umweltverbandsklage-in-der-rechtspolitischen)