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Ms Fiona Marshall

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Communication to the Aarhus Convention Compliance Committee concerning compliance by Germany (Germany PRE/ACCC/C/2015/137)

Consideration of the preliminary admissibility

Berlin, 1 March 2016

Dear Ms. Marshall,

We thank for the submission of this new communication of 10 February 2016 and would like to participate via audio-conference during the consideration of the preliminary admissibility by the Compliance Committee in its 52nd forthcoming session.

Furthermore we take this opportunity to inform the Compliance Committee on some points that might be of relevance concerning the consideration of the preliminary admissibility of communication PRE/ACCC/C/2015/137.

1. Domestic Remedies

The Federal Republic of Germany has doubts concerning the admissibility of the communication. The admissibility of the communication is to be determined by the Compliance Committee of the Aarhus Convention *inter alia*

in accordance with paragraph 21 of the annex to decision I/7. According to that paragraph, the Committee

> *"should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress".*

Contrary to what the communicant brought forward, there are domestic remedies available in Germany that can bring effective and sufficient means of redress for the communicant.

The German Government emphasizes that the communicant has never submitted a request for recognition under the German Environmental Appeals Act (EAA) so far. However, the communicant could request recognition. In case of a rejection of his request, the communicant could take legal steps against that rejection.

The communicant's core argument may be summarized as follows: Section 3 paragraph 1 sentence 2 number 5 of the EAA is not in compliance with the Aarhus Convention. This provision requires that an environmental organization asking for recognition under the EAA allow in principle any person who supports the objectives of the organization to become a member with full voting rights ("democratic internal structure" of the organization).

The communicant could challenge a possible rejection on the grounds that there might be no reasonable justification for this prerequisite neither in domestic, nor in EU or international law.

The administrative court would then have to examine whether section 3 paragraph 1 sentence 2 number 5 EAA is compatible *inter alia* with Article 3 section 1 of the German Constitution (Basic Law), which enshrines the

principle of non-discrimination. If the court concluded on a possible violation, it would have to ask for a decision by the Federal Constitutional Court.

Furthermore, the administrative court would have to consider whether the relevant section of the EAA complies with the Directives of the European Union transposing the Aarhus Convention into European Union Law.[1] If the court concluded on a violation, it could ask the Court of Justice of the European Union (CJEU) for a preliminary ruling; a court of last resort would even be obliged to do so.

Alternatively, the communicant could submit a complaint to the European Commission, questioning the compliance of section 3 paragraph 1 sentence 2 number 5 EAA with EU Law (Directives and the Aarhus Convention). If the European Commission follows the argument, it could initiate an infringement procedure, possibly resulting as well in proceedings before the CJEU.

Concluding, there are domestic remedies that offer effective and sufficient means of redress for the communicant. However, as the communicant has not even requested recognition, the conclusion must be drawn that domestic remedies have not yet been exhausted. According to paragraph 21 of the annex to decision I/7, the Compliance Committee will have to take this into account.

[1] In particular Articles 3 and 4 of the Directive 2003/35/ EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. The definition of the "public concerned" provided in the directives is identical to the wording of Article 2 number 5 Aarhus Convention.

2. Preliminary observations 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 communication PRE/ACCC/C/2015/137.

Germany is of the opinion that the allegations made against the domestic legal system are unfounded.

- Some allegations are inaccurate, such as the description of the prerequisites for recognition under section 3 paragraph 1 EAA (part III. 7. a) of the communication). In particular, the EAA contains objective criteria to ensure that organizations may be recognized under the EAA only if their internal structure guarantees a democratic decision-making process within that organization. Yet, the criteria are neither conceived nor applied as a means of excluding specific organizations or specific forms of organizations from recognition as such.
- In the view of Germany, section 3 paragraph 1 sentence 2 number 5 EAA is in accordance with Article 2 paragraph 5 of the Aarhus Convention ("non-governmental organizations promoting environmental protection and meeting any requirements under national law"). At this stage of the proceedings Germany would like to focus on the following clarification: Contrary to the communicant's submission (part III. 7. a) of the communication), the criteria for recognition also allow "Vereinigungen" which are set up in other legal forms than registered associations with legal personality to be granted recognition (which happens in practice, although seldom). The criteria for recognition were first established by the Federal Act on Nature Conservation in 1976. In 2006 by implementing the provisions of the Aarhus Convention, the term "Vereinigung" was deliberately introduced to replace the narrower term "registered as-

sociation" (*eingetragener Verein*). "Vereinigung" is a general term for all forms of organizations, associations and groups of various legal forms, including associations without legal personality and citizens' initiatives, provided they have a certain degree of internal organization and a statute. Although "Vereinigung" means "association" in a non-legal context, the legal term "Vereinigung" as used in the EAA may **not** be translated with "association" (as did the communicant in Annex 1); there is no English equivalent for that German legal term.

- Additionally, and contrary to the communicant's allegation, there are no stricter criteria for recognition of environmental organizations in the laws of the federal states of Bavaria and Saxony (part III. 3. of the communication): The relevant legislation of these federal states (*Laender*) on nature protection does not contain any such provisions, neither in the sections referred to by the communicant, nor in any other section.

- Moreover, the German Government would like to stress that the list of recognized environmental organizations provided by the communicant in attachment 2 of the communication is partly not correct: A preliminary survey among the federal states and the Federal Environmental Agency has shown that the list is both incomplete and inaccurate (e.g. with regard to the recognitions granted by the Federal Environmental Agency, Hesse, North Rhine-Westphalia, Rhineland-Palatinate and Saxony).

- Other allegations lack *a priori* any legal relevance, such as the alleged violation of the Aarhus Convention with regard to events relating to the years 2002 and 2006 (part III. 7. c) of the communication). Germany ratified the Aarhus Convention only on January 15, 2007. Pursuant to Article 20 paragraph 3 Aarhus Convention, the Convention entered into

force for Germany on April 15, 2007. Thus, the Aarhus Convention is inapplicable *ratione temporis* to Germany with regard to all facts relating to events prior than April 15, 2007.

- The German Government is concerned about the fact that the communication contains several questionable statements with regard to environmental NGOs in Germany, which might theoretically be recognized. Yet, this is of no relevance to the compliance question at issue. Moreover, the communication criticizes already recognized NGOs for not making sufficient use of their rights or other NGOs for not requesting recognition at all. It is not for the Federal Government to comment on this. Germany has to offer an appropriate recognition system, which it does. In the view of the German Government, the functioning of the German recognition system may be proven best by taking a look at the total number of recognitions compared to the number of applications on the federal level: out of 142 applications, 109 organizations were recognized by the Federal Environmental Agency (before 2006: by the Federal Ministry for the Environment), only two were rejected, while the other applications are still pending or have been withdrawn.

- Accordingly, in an evaluation study concerning the EEA[2], 14 out of the 15 German environmental NGOs involved in the study assessed the criteria for recognition as "reasonable" or even "low" (see page 58f.). The study concluded that the criteria for recognition are overall manageable by NGOs and that no need for any action exists (see page 3).

[2] See UBA-Texte 14/2014, Research Project: Evaluation of the Use and Effects of the Options for Associations to Take Legal Action under the Environmental Appeals Act, project code number 3711 18 107, February 2014, available at: https://www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_14_2014_evaluation_von_gebrauch_und_wirkung_der_verbandsklagemoeglichkeiten_0.pdf.

- Finally, and contrary to what the communicant suggested, the quoted German legislation in the fields of consumer protection and social law cannot be compared to the legislation on access to justice in environmental matters: Not only do the former – obviously – not fall into the framework of the Aarhus Convention, they also follow substantively different concepts.

3. Determination by the Compliance Committee

If the Committee determines the communication PRE/ACCC/C/2015/137 admissible, Germany would 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