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Third Draft of the Recommendations on Public Participation in Decision-making in Environmental Matters
Comments of the German Delegation

Reference: ZG III 6 - 45074/7.14

Berlin, 15.04.2013

Dear Sir or Madam,

according to our common practice Germany subscribes to the EU+MS contribution on the Third Draft of the Recommendations on Public Participation in Decision-making in Environmental matters and would like to submit the following additional comments.

Germany welcomes the Third Draft of the Recommendations on Public Participation in Decision-making in Environmental Matters as a measure for improving implementation of the provisions of the Aarhus Convention on this issue. In particular, we appreciate that most of our comments on the Second Draft of the Recommendations have been taken into account. It is also welcomed that both the introduction as well as the Recommendations itself clearly state their non-binding character.

However, we would like to point out five aspects of the Third Draft of Recommendations requiring in our opinion a revision:

(1) With regard to the Aarhus Convention's requirement for the public to have an opportunity to participate when all options are open, it is stated in **paragraph 15** that the public should have a possibility to **provide input/comments on whether the proposed activity should go ahead at all**. In some countries due to constitutionally guaranteed fundamental rights of the developer it might be difficult to succeed with such comments proposing to not go ahead at all with the planned activity. For example, in Germany in the field of industrial installations the developer has a right to be granted a permit for the planned activity if all legal requirements are fulfilled. Therefore the public surely can comment, that the activity shall not be realised, but the impression should be avoided that this could be successful without raising further arguments regarding specific legal requirements. This leads to the conclusion that in the decision-making process besides the public's comments on the going ahead of the planned activity also the developer's legitimate rights have to be considered. Hence we suggest adding an appropriate formulation as in paragraph 18, such as "but also taking into account the legitimate expectations of the developer" (see also track changes in the enclosure).

(2) In **paragraphs 27 to 30** the Draft Recommendations refer to **transboundary cases** of public participation. Since the Espoo Convention and the SEA Protocol are *leges speciales* on this issue they should explicitly be mentioned, e.g. in a footnote.
In this regard we appreciate the reference made in paragraphs 30 and 134 on the "Good Practice Recommendations on Public Participation in Strategic Decision-making" prepared under the SEA-Protocol. In

addition, the "Guidance on the practical application of the Espoo Convention" and the "Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context" both prepared under the Espoo Convention should also be mentioned.
See for this set of proposed amendments the track changes in the enclosure.

(3) In **paragraph 34 (g)** it is recommended that "by virtue of the first sentence of **paragraph 22 of annex 1**, any change to or extension of an activity listed in annex 1 of the Convention for which no threshold is set be likewise subject to the requirements of article 6, para. (1) (a), regardless of their seize." This recommendation is based on the findings of the Aarhus Compliance Committee in a compliance case with regard to Slovakia (ECE/MP.PP/2011/11.Add.3, para.58). The subject matter of this compliance case was the decision-making on permits for the construction of two new reactors at a nuclear power plant. Therefore the Compliance Committee's finding can only apply to this subject matter. A general application of this finding to all activities for which no threshold is set would be inconsistent with the clear wording of paragraph 22 of Annex 1, which reads:

> "Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention."

Sentence 1 of paragraph 22 of Annex 1 clearly only applies to any change to or extension of activities which meet the thresholds and/or criteria set out in Annex 1. Hence it requires thresholds and/or criteria being set out in Annex 1. Activities for which no criteria and/or

threshold exist, do not subject to sentence 1. They are rather governed by sentence 2 of paragraph 22 of Annex 1, just as any change to or extension of activities which does not meet the thresholds and/or criteria set out in Annex 1.

It is understandable to recommend deviation from this clear wording in case of the construction of a new reactor at the site of an existing nuclear power plant because on any other site this would be a new activity and as such requiring a procedure according to Article 6 paragraph 1 (a) of the Convention. However, as long as paragraph 22 of Annex 1 of the Convention is formulated as it stands, a general deviation as recommended in paragraph 34 (g) of the Draft Recommendations is not compatible with the Aarhus Convention. Furthermore it would have severe consequences on the legal implementation and practical application of the Convention by Parties if really every change or extension should have to undergo a permit procedure including public participation. A more practical recommendation could focus on the specific importance of the change or extension for the environment on a case-by-case basis taking into account whether it is "substantial", which means in accordance with Article 3 paragraph 9 of Directive 2010/75/EU, it may have significant negative effects on human health or the environment. This demonstrates that maybe further consideration is required and that the text of the recommendation must be clarified.

Therefore we suggest pointing out in paragraph 34 (g) that this recommendation only applies to the subject matter of the compliance case to which reference is made. See also our proposed amendments in track changes in the enclosure.

(4) According to **paragraph 136 (b) voluntary programmes subject to plans and programmes**. This statement is not compatible with the jurisdiction of the Court of Justice of the European Union (CJEU) on Directive 2001/42/EC on the Assessment of the effects of certain plans and programmes on the environment. In Case C-567/10 the CJEU ruled that "plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down" (ibid. paragraph 31). Hence plans and programmes whose adoption is not regulated by national legislative or regulatory provisions and which are adopted on a purely voluntary base do not subject the meaning of "plans and programmes" of Directive 2001/42/EC. They are rather policies. Therefore we suggest deletion of the words "voluntary programmes".

(5) The recommendations given in **paragraphs 138 to 167** on public participation concerning plans, programmes and policies as well as those given in **paragraphs 168 to 174** on public participation during the preparation of executive regulations and laws seem to be newly drafted even though on the Workshop in October 2012 it was agreed to shorten the Draft Recommendations. In addition, the detailed explanations given in the above mentioned paragraphs are inconsistent with the statement in paragraph 133 that "bearing in mind the special character of plans, programmes and policies [..] the recommenda-

tions regarding article 6 should be applied mutatis mutandis and appropriate."

Therefore we suggest shortening the recommendations, e.g. by deleting the repetition of the recommendations on Article 6 of the Aarhus Convention and by pointing out deviations from these recommendations which are necessary due to the specifics of plans, programmes, policies, executive regulations and laws.

Finally, in paragraph 8 of the Draft Recommendations we added another proposal for clarification.

Yours sincerely,

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