Response of the Federal Republic of Germany to the communication of ClientEarth to the Compliance Committee of the Aarhus Convention, reference no. ACCC/C/2008/31

On 12 January 2009, the Federal Republic of Germany received written notification of a communication submitted by ClientEarth to the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). In the communication, it is contended that the Federal Republic of Germany has not implemented article 9, paragraphs 2, 3 and 4, of the Aarhus Convention or that it has not done so completely.

At its twenty-second meeting from 17 to 19 December 2008, the Compliance Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7 (ECE/MP.PP/2/Add.8). In addition, by letter of 16 January 2009, the Compliance Committee invited the Federal Republic of Germany to submit an answer to certain supplementary questions. These questions relate primarily to national case-law in connection with the Aarhus Convention. In light of a reference for a preliminary ruling pending before the Court of Justice of the European Communities (ECJ) in Case C-115/09 in which a ruling was sought on similar questions, by letter of 23 March 2009, the Federal Republic of Germany requested the Compliance Committee to suspend the review of the communication. At its twenty-third meeting from 31 March to 3 April 2009, with the agreement of the communicant, the Compliance Committee determined that the time-limit for response should be postponed. This is due to expire two months following the handing down of the ECJ judgment in Case C-115/09. The ECJ gave its judgment on 12 May 2011, and, as a consequence, the time-limit for submitting a response will expire on 12 July 2011.

In the text below, first, a response will be given to the communication of ClientEarth. To the extent that the questions of the Compliance Committee remain unanswered in that response, they will be answered in a subsequent section.

I. Response to the communication of ClientEarth

In the communication of ClientEarth, it is alleged that the Federal Republic of Germany has infringed article 9, paragraphs 2, 3 and 4, of the Aarhus Convention.

a. Alleged infringement of article 9, paragraph 2, of the Aarhus Convention

The communication relates primarily to article 9, paragraph 2, of the Aarhus Convention. This provision is worded:

> ‘Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
>
> (a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. …'

The Federal Republic of Germany is alleged to have infringed article 9, paragraph 2, of the Aarhus Convention on five separate counts (see the summary in paragraph 7 of the communication). These all relate to the Umwelt-Rechtsbehelfsgesetz (Environmental Appeals Act).

Preliminary observation: interpretation of article 9, paragraph 2, of the Aarhus Convention

In considering each allegation made concerning Germany's implementation of article 9, paragraph 2, of the Aarhus Convention, regard must be had to the wording of that provision. According to that provision, each Party shall ensure the implementation of article 9, paragraph 2, of the Aarhus Convention, **'within the framework of its national legislation'**. That wording was chosen deliberately by the Contracting States and it aims to achieve a specific purpose. Namely, article 9, paragraph 2, of the Aarhus Convention does not seek to establish the same system of access to justice in environmental matters in all Contracting States but to allow the Parties a discretion on implementation with a view to achieving the objectives of article 9, paragraph 2, of the Aarhus Convention. It is incumbent on a Contracting State to implement the requirements of that provision within the framework of its national law. However, for those purposes, a Party is not required as a matter of necessity to amend its national law and, in particular, existing principles of its legal system and this applies irrespective of whether procedural law or substantive law is at issue. That is the unambiguous requirement of article 9, paragraph 2, of the Aarhus Convention. If the Parties had sought to achieve something different, they would have had to choose a different wording.

Therefore, this wording cannot simply be ignored and the provision applied as if the phrase 'in the framework of its national legislation' were not included. That would clearly contradict the will of the Parties. The Convention establishes that the Parties have a discretion on implementation. Naturally, that discretion is not so extensive that States may ignore article 9,

paragraph 2, of the Aarhus Convention. However, it is not so negligible that a Party must necessarily amend its existing legal system in order to satisfy Convention requirements.

Consequently, in assessing the following legal questions, what is crucial is finding the correct balance between the discretion on implementation available to the Federal Republic of Germany and the substantive elements of article 9, paragraph 2, of the Aarhus Convention. That requirement was ignored in the communication of ClientEarth with respect to the following allegations. For that reason alone, its interpretation of the requirements of article 9, paragraph 2, of the Aarhus Convention is weighted too heavily in one direction and, thus, does not reflect the will of the Parties on concluding the Aarhus Convention.

Point 1: restricting the decisions, acts and omissions of public authorities that environmental organizations can review to decisions which affect the organization's statutory objectives

Contrary to the view taken by the communicant, section 2 (1) no. 2 of the Environmental Appeals Act does not infringe article 9, paragraph 2, of the Aarhus Convention. First, this constitutes a **requirement under national law** and, hence, implements article 2, paragraph 5, of the Aarhus Convention. Second, the provision reflects the **spirit and purpose of the Aarhus Convention**.

(1) Article 2, paragraph 5, of the Aarhus Convention

Article 9, paragraph 2, of the Aarhus Convention refers to the 'public concerned'. According to article 2, paragraph 5, of the Aarhus Convention, the public concerned means

> 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and **meeting any requirements under national law** shall be deemed to have an interest.'

According to this provision, the Parties themselves may determine the requirements which non-governmental organizations must satisfy to bring review proceedings. From the wording of article 2, paragraph 5, of the Aarhus Convention no limitation is apparent concerning the rules which may apply. However, these must relate to non-governmental organizations. Therefore, it would not be possible to include a general requirement on standing applicable both to natural persons and non-governmental organizations within the scope of article 2, paragraph 5, of the Aarhus Convention. The aim of the provision is to allow each Party to determine the requirements which non-governmental organizations must satisfy in order to obtain access to a review procedure within the meaning of article 9, paragraph 2, of the Aarhus Convention. The question of whether satisfaction of these requirements must be determined by the national authorities or courts in advance, in the abstract, by means of a recognition procedure or separately, in each individual case, is not laid down and, thus, a matter for the Contracting States. Not even the objectives which a Party may pursue by means of its national legislation are prescribed. However, it may be presumed, by way of limitation, that objectives are not permitted which contradict the Aarhus Convention and undermine its

spirit and purpose. This marks the boundary of the discretion on implementation which is accorded to Contracting States under article 2, paragraph 5, of the Aarhus Convention.

(2) Requirement under national law

Both section 2 (1) no. 2 and section 3 of the Environmental Appeals Act are requirements under national law for the purposes of article 2, paragraph 5, of the Aarhus Convention. As regards section 3 of the Environmental Appeals Act, this is also acknowledged in the communication. Pursuant to section 2 (1) no. 2 of the Environmental Appeals Act, for the purposes of filing an appeal, an environmental association must assert that promotion of the objectives of environmental protection in accordance with its field of activities as defined in its bylaws is affected. Thus, section 2 (1) no. 2 of the Environmental Appeals Act also constitutes a requirement under national law as provided for in article 2, paragraph 5, of the Aarhus Convention, as it establishes a requirement which non-governmental organizations must satisfy if they wish to file an appeal.

Contrary to the assertion made in the communication, that is not precluded by the fact that section 3 of the Environmental Appeals Act lays down criteria for the recognition of non-governmental organizations. Section 3 of the Environmental Appeals Act is **not exhaustive** in establishing the requirements under national law. Instead, it is supplemented by section 2 (1) no. 2 of the Environmental Appeals Act.

The conditions established by section 3 of the Environmental Appeals Act constitute the **basic requirements** to be satisfied under German law **in every appeal** which an association seeks to bring pursuant to section 2 of the Environmental Appeals Act. These are general requirements concerning matters such as the period for which the association has existed and the pursuit of public-benefit purposes. These conditions must be satisfied in the same way in relation to every appeal and can be assessed independently of any specific case. In order to save the competent authority and court from having to assess these conditions in every single case and also to save the non-governmental organization from having to furnish proof in each individual case, the German legislature opted for a recognition procedure. This recognition system was successfully introduced in the framework of the Bundesnaturschutzgesetz (Federal Environmental Protection Act). Under the scheme, an association is entitled to recognition if it satisfies all the conditions. Following recognition, it is no longer necessary to demonstrate in an individual case that the conditions are satisfied.

However, this procedural approach to assessment is only logical in relation to conditions which apply to all cases regardless of the individual matter at hand. That does not include the requirement that an association must be affected as regards a matter which, under its bylaws, falls within its field of activities. This is something which cannot be assessed in advance, on a general basis, but only in the context of an individual case. Simply on those procedural grounds, the requirement established by section 2 (1) no. 2 of the Environmental Appeals Act is not included within section 3 of the Environmental Appeals Act.

As already argued, article 2, paragraph 5, of the Aarhus Convention does not distinguish between those requirements under national law which apply generally to all possible cases and those which apply to an individual case. It is for each Party to determine specific details. It would also have been open to the Federal Republic of Germany not to establish a scheme of

general recognition and to leave it to the authority and the courts to assess the requirements in each individual case. In that case, the condition established in section 2 (1) no. 2 of the Environmental Appeals Act would have constituted an element of those requirements and been included together with the requirements of section 3 of the Environmental Appeals Act. However, the fact that the Federal Republic of Germany opted for a scheme of general recognition for associations – something which, in its view, is simpler for all concerned – and, as a consequence, set out the requirements in two separate provisions cannot make any difference for the purposes of determining compatibility with article 9, paragraph 2, of the Aarhus Convention.

(3) Spirit and purpose of article 9, paragraph 2, in conjunction with article 2, paragraph 5, of the Aarhus Convention

The condition established in section 2 (1) no. 2 of the Environmental Appeals Act also does not over-extend the freedom given to the Parties under article 2, paragraph 5, of the Aarhus Convention. The objective which the Federal Republic of Germany seeks to pursue with that provision contradicts neither the spirit and purpose of article 9, paragraph 2, in conjunction with article 2, paragraph 5, of the Aarhus Convention nor the objective of the Convention as a whole.

According to the objectives of the Aarhus Convention, non-governmental organizations, as independent representatives of the public, should be able to pursue the public interest in environmental matters. They are qualified to do this by reason of their greater size and financial resources and, above all, their expertise. That basic principle is reflected in the condition established by section 2 (1) no. 2 of the Environmental Appeals Act. It seeks to ensure that only such non-governmental organizations participate in proceedings as are, in accordance with their bylaws, substantively concerned with this subject-area. As a result, this ensures that the **public interest is represented as competently as possible** and minimises the risk that the special possibilities afforded to non-governmental organizations to file an appeal are not abused. Having regard to the broad spectrum encompassed by environmental law, from climate protection to nature conservation, from the law on waste to chemical safety, and from agriculture to road transport, it is perfectly justified not to regard every organization which is concerned with one environmental issue as a competent representative of the public in relation to every other environmental issue. It is not apparent why an environmental association which is specialised, for example, in coastal conservation should in the case of an inland waste disposal installation constitute a more competent representative of the public interest than any other non-governmental organization.

Finally, the condition established in section 2 (1) no. 2 of the Environmental Appeals Act also does not unduly restrict the right of non-governmental organizations to seek judicial review. Every organization is free to determine its official objectives and, where necessary, also to amend these.

Point 2: failing to provide for procedural, as well as substantive, review of the decisions, acts and omissions of public authorities

In paragraph 26 of the communication, it is alleged that in the Environmental Appeals Act the Federal Republic of Germany has failed to transpose the wording of article 9, paragraph 2, of the Aarhus Convention into German law. According to the communicant, this measure was necessary as, under German law, procedural errors may not normally be challenged in court.

The allegation is unfounded. First of all, procedural errors may also be challenged before German courts. Second, the Aarhus Convention does not oblige Contracting States to adopt any particular wording.

(1) Procedural errors reviewable in Germany

Article 9, paragraph 2, of the Aarhus Convention requires the Parties to ensure **within the framework of their national legislation** that associations may **challenge** the substantive and **procedural legality** of decisions subject to article 6 of the Aarhus Convention.

German law satisfies those requirements. Pursuant to section 2 (1) of the Environmental Appeals Act, 'decisions' as defined in section 1 (1), first sentence, of the Environmental Appeals Act are amenable to legal challenge. This means that the decision as a whole is amenable to review. Authorities and courts review both the formal and substantive legality of decisions.

The contention in paragraph 26 of the communication that procedural errors normally may not be challenged before German courts is incorrect. In appeals, the allegation of a procedural error may always be advanced (for further detail see the response to point 4). To the extent that the communication raises the issue of the legal consequences which must be provided for in national law in the case of a procedural error, article 9, paragraph 2, of the Aarhus Convention is silent on this point. In particular, article 9, paragraph 2, of the Aarhus Convention does not oblige Contracting States to ensure that every procedural error automatically results in the reversal of a decision subject to article 6 of the Aarhus Convention. The consequences provided for in German law in the event of procedural errors will be explained in detail below in the response to point 4.

(2) Adoption of the wording unnecessary

Moreover, article 9, paragraph 2, of the Aarhus Convention does not oblige Contracting States to adopt the wording of the provision. This applies generally to all the provisions of the Convention and, in particular, in article 9, paragraph 2, of the Aarhus Convention is restated explicitly by the reference to 'national legislation'. Thus, the Federal Republic of Germany is afforded a discretion in the wording it uses to transpose the provision. As regards the issue of procedural legality, it follows from article 9, paragraph 2, of the Aarhus Convention quite simply that procedural errors may not be ignored under national law.

Point 3: restricting the rights of review of environmental organizations to a review of provisions which promote the protection of the environment

The allegation is levelled against the Federal Republic of Germany that the Environmental Appeals Act in section 2 (1) no. 1 limits non-governmental organizations to the challenge of 'decisions or failures to make decisions which promote the protection of the environment'. According to the communicant, this is a limitation on the requirements established by the Aarhus Convention pursuant to which any decision must be amenable to challenge.

(1) No restriction on the decisions amenable to review

This allegation is unjustified. It is probably based on an incorrect understanding of the relevant provision of the Environmental Appeals Act. Section 2 (1) no. 1 of the Environmental Appeals Act **does not establish a restriction in favour of certain decisions**. Instead, the category of decisions amenable to challenge under the present law results from section 1 of the Environmental Appeals Act. In contrast, section 2 (1) no. 1 of the Environmental Appeals Act provides that a non-governmental organization may only assert an infringement of **provisions** promoting the protection of the environment. Consequently, it is irrelevant whether the 'decision' or the 'failure' promotes the protection of the environment; the issue is whether the provision which the decision is alleged to have infringed promotes the protection of the environment. In this regard, the purpose of the decision is irrelevant. All decisions as defined in section 1 (1) of the Environmental Appeals Act and thus all decisions subject to article 6 of the Aarhus Convention are amenable to challenge irrespective of their objective.

(2) Restriction to legislation promoting the protection of the environment justified

If the communication is to be understood as to contend that the restriction of the review to legislation promoting the protection of the environment contravenes article 9, paragraph 2, of the Aarhus Convention, such contention is incorrect. Were one to interpret article 9, paragraph 2, of the Aarhus Convention as establishing the possibility to challenge the application of all possible legislation without any reference to the environment, this would clearly over-extend the scope of the Aarhus Convention.

Instead, section 2 (1) no. 1 of the Environmental Appeals Act reflects specifically the spirit and purpose of the Convention, that is, the promotion of environmental protection.

This objective follows from several passages in the Convention. The title itself refers expressly to 'environmental matters'. At various points, the preamble refers to the protection of the environment ('protect ... the state of the environment', 'adequate protection of the environment') and stresses 'the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection'. It is also clear from article 1 of the Aarhus Convention that the Convention seeks to promote the protection of the environment.

In furtherance of that objective, article 9, paragraph 2, of the Aarhus Convention seeks to ensure that in relation to 'environmental decision-making' (as mentioned in the preamble) subject to the provisions of article 6 of the Aarhus Convention members of the public concerned may obtain judicial review before the national courts of the application of

environmental law, that is, the law which promotes the protection of the environment. This also follows from article 2, paragraph 5, of the Aarhus Convention. According to that provision, such non-governmental organizations as 'promot[e] **environmental protection**' may be deemed to have an interest in environmental decision-making. Such a restriction would be counter-productive, if article 9, paragraph 2, of the Aarhus Convention envisaged the possibility to challenge also the infringement of legislation other than that intended to promote the protection of the environment.

Finally, it is also ensured that neither difficulties in classification nor legal uncertainties arise. The explanatory memorandum to the Environmental Appeals Act explicitly states that section 2 (1) no. 1 of the Environmental Appeals Act also includes legislation not exclusively intended to promote the protection of the environment but also to ensure other objectives (Legislative proposal by the German Federal Government of 4 September 2006, Drucksache (Printed paper) 16/2495, p. 12).

Point 4: restricting the rights of review of environmental organizations to a review of provisions which are relevant to the decision of the public authority

The communication contends that the rights of review of environmental organizations are severely curtailed by section 2 (1) no. 1 and section 2 (5) no. 1 of the Environmental Appeals Act. According to the communicant, as, under the Environmental Appeals Act, only challenges to decisions which contradict legal provisions that may be relevant to the decision are allowed (paragraph 30), this means that only the review of certain provisions is permitted. However, in its view, according to article 9, paragraph 2, of the Aarhus Convention, the review of any decision must be permitted (paragraph 31). Moreover, so the communicant asserts, it follows from the case-law of the Bundesverwaltungsgericht (Federal Administrative Court) that a failure to carry out an environmental impact assessment (EIA) is deemed not relevant to a decision, unless it can be proven that the decision on the project would have been different had the environmental impact assessment been carried out. This situation is said to have been hardly changed through the introduction of section 4 (1) of the Environmental Appeals Act. First, this provision is said only to apply to a complete failure to carry out an environmental impact assessment. Second, it is uncertain whether or not this is undermined by the requirements of section 2 (5) of the Environmental Appeals Act. Pursuant to article 9, paragraph 2, of the Aarhus Convention – the communicant stresses – there must be an unlimited possibility to challenge the substantive and procedural legality of any decision.

These contentions relate to two separate issues. First, they raise the issue of how procedural errors are treated under German law (see heading 1 below) and second they concern the substance of section 2 (1) no. 1 and section 2 (5) no. 1 of the Environmental Appeals Act (see heading 2 below).

(1) The treatment of procedural errors under German law

The treatment accorded to procedural errors under German law satisfies the requirements of the Aarhus Convention as it ensures the observance of all the essential procedural steps provided for in article 6 of the Aarhus Convention.

(a) Procedural errors in German law

Principles of German procedural law

In assessing whether German law complies with the Aarhus Convention regard must be had to the principles of German procedural law. In the German legal order, the significance accorded to procedural law differs from that accorded in many other legal orders.

In many legal systems, the public administration is accorded a wide discretion, not amenable to review by the courts. In those systems, the courts have only a very limited possibility to review administrative decisions. As the function of procedural rules is to specify the route by which an authority is most likely to come to the correct decision – for example, through a scheme for public participation which ensures that all concerns can be identified and taken into account – in the legal systems in question, it is especially important that those procedural rules are strictly observed. In that context, control of those procedural rules is the most important (and only) means of ensuring good decision-making. Thus, in those legal orders, the substantive 'correctness' of decisions is ensured, above all, by ensuring observance of the correct procedure (which may include a sanctioning of the administration).

In contrast, German law does not need to rely to the same extent on upholding procedural correctness in order to ensure the legality of substantive decisions. That is because, under German law, but for a few exceptions, all administrative decisions are amenable to full substantive review by the courts. In the German legal order, the administration is accorded very limited discretion in the interpretation of whether conditions are satisfied. Namely, the substantive conditions to be satisfied for the issue of a permit are, as a rule, laid down in law. The satisfaction of those conditions and the conduct of the administration are amenable in their entirety to judicial review. As a rule, in its review of the substantive conditions to be satisfied, a court will undertake its own assessment. Only in a clearly defined set of exceptions – where an interpretative discretion has been recognised – will a court simply review whether errors occurred in the authority's assessment of the conditions without, at the same time, carrying out an assessment of its own. In addition, where the administration is accorded a discretion as to the action to be taken, that, too, is amenable to review for errors of assessment.

Therefore, to the extent that the substantive decision of an authority is amenable to a complete review by the court, for the purposes of ensuring the correctness of the decision, from the court's perspective, procedural errors are of secondary importance.

Verwaltungsverfahrensgesetz (Administrative Procedures Act)

In Germany, therefore, procedure is intended primarily to facilitate decision-making. Procedural law is intended to ensure the substantive correctness of the decision and to promote the best possible realisation of the substantive legal position. This is reflected, above all, in **section 46 of the Administrative Procedures Act**. According to that provision,

> 'the setting aside of an administrative act which is not void pursuant to section 44 cannot be claimed simply on the basis that in the course of its adoption provisions on procedure ... were infringed where it is evident that the infringement did not affect the substantive decision.'

Consequently, the infringement of a procedural rule generally only results in the setting aside of a decision where that infringement may have affected the decision. This is intended to preclude unnecessary delays on mere grounds of form and with no substantive relevance and, thus, constitutes primarily a measure of procedural economy. In addition, this also ensures a fair balance is achieved between the different interests which apply in a three-way situation. Namely, if an authority commits a procedural error and its decision were to be set aside without any consideration of whether such error has produced an effect, this would impose a unilateral burden on the party in whose favour the decision was taken.

However, there are, in addition, also under German law, 'fundamental errors of procedure', that is, errors which regardless of the outcome of the procedure are regarded as substantial and which will result in the reversal of the decision. In relation to this kind of procedural error, the principle of section 46 of the Administrative Procedures Act specifically does not apply.

Case-law of the Federal Administrative Court

In line with the principles mentioned, the Federal Administrative Court has held in its case-law that, as a rule, a procedural error will only result in the setting aside of a decision or the mandatory observance of a procedural step if 'in the circumstances of the case there is a real possibility' that the error had a bearing on the outcome of the decision (see, for example, Federal Administrative Court, judgment of 20 May 1998, case no.: 11 C 3/97).

(b) Satisfaction of the requirements of the Aarhus Convention

Having regard to the interpretation reached by the administrative courts and the additional features introduced by the Environmental Appeals Act, the German legal system, as set out here, ensures that the requirements of the Aarhus Convention are satisfied.

Requirements which follow from the wording of article 9, paragraph 2, of the Aarhus Convention

At the outset, it must be noted that article 9, paragraph 2, of the Aarhus Convention is silent on the consequences which should follow from procedural errors. It **requires simply a review of procedural legality** in relation to matters covered by article 6 of the Aarhus Convention. This also corresponds to the purpose of article 9, paragraph 2, of the Aarhus Convention. This follows as article 9 of the Aarhus Convention simply governs – as established in the heading to that provision – **access to justice**. The nature of the review to be undertaken by the courts is not laid down. Consequently, with respect to issues of substantive legality, it is abundantly clear that article 9 of the Aarhus Convention does not impose on the Contracting States any requirements concerning the yardstick to be adopted by national courts, the intensity of the judicial review and the legal consequences which must follow in the event of an infringement. These are all matters for a Party to determine **in the framework of its national legislation**. However, as the wording of article 9, paragraph 2, of the Aarhus Convention does not distinguish between substantive and procedural errors that freedom accorded to the Contracting States must apply also to procedural errors.

From that, it follows that the wording of article 9, paragraph 2, of the Aarhus Convention requires simply that non-governmental organizations are accorded access to the courts for the purposes of obtaining a review of procedural errors. Judicial review of procedural errors is **ensured**, under German law, by the fact **that each procedural error is reviewed to determine whether it could have had a bearing on the outcome of the decision**. Thus, as regards the wording of the provision, the requirements of article 9, paragraph 2, of the Aarhus Convention are satisfied.

Spirit and purpose of article 9, paragraph 2, of the Aarhus Convention and balance to be achieved

Naturally, the transposition by the Contracting Parties may not undermine the spirit and purpose of article 9, paragraph 2, of the Aarhus Convention. If – regardless of the fact that a judicial review of decisions always takes place – this judicial review never results in the sanctioning of errors, the wide access to justice and, as a consequence, the requirements of article 9, paragraph 2, is rendered nugatory. Therefore, national legislation must ensure that the spirit and purpose of article 9, paragraph 2, of the Aarhus Convention is satisfied. The aim of that provision is to ensure that the requirements of article 6 of the Aarhus Convention are observed. Article 6 of the Aarhus Convention establishes that prior to the taking of certain decisions there must be public participation and lays down the procedure by which this is to be achieved.

In satisfying the spirit and purpose, consideration must be given to the fact that this has to be ensured 'within the framework of national law'. Thus, the principles of national law continue to apply. This applies also to the treatment of procedural errors under German law.

In balancing the spirit and purpose of article 9, paragraph 2, of the Aarhus Convention against the discretion accorded to a Party on implementation, it follows that judicial review by the German courts should ensure that the essential requirements of article 6 are observed and, at the same time, allow consideration to be given to the relevance of an error.

Essential elements of article 6 of the Aarhus Convention ensured by section 4 of the Environmental Appeals Act and the interpretation reached by German administrative courts

The Federal Republic of Germany has satisfied this requirement.

By way of the Environmental Appeals Act and the Gesetz über die Umweltverträglichkeitsprüfung (Federal Environmental Impact Assessment Act), the German legislature has definitively established the importance attached to the public participation procedure. Section 4 of the Environmental Appeals Act expressly provides that the reversal of a decision may be requested if the necessary environmental impact assessment or the necessary preliminary assessment to determine whether a project is subject to the requirements on environmental impact assessments was not carried out. Pursuant to that provision, private individuals and non-governmental organizations may apply to the courts to require that an environmental impact assessment or a preliminary assessment prior to an environmental impact assessment is carried out in accordance with the German requirements on environmental impact assessments. That clarification follows the judgment of the ECJ in Case C-201/02 *Wells* [2004] ECR I-723 on the Environmental Impact Assessment Directive

(Directive 85/337/EEC). Insertion of the provision was necessary simply because, in the Federal Republic of Germany, an environmental impact assessment is seen a procedural step.

In addition, on that basis and in accordance with the abovementioned principles of German procedural law, the German courts also ensure that the essential elements of the procedure prescribed by article 6 of the Aarhus Convention are observed. Even before the entry into force of the Environmental Appeals Act, the Federal Administrative Court identified circumstances in which a court must hold a real possibility to exist that a procedural error could have had a bearing on the outcome (judgment of 13 December 2007, case no.: 4 C 9/06):

> 'If as a result of the omission to carry out a formal EIA that objective [of assessing the impact on the environment] was not achieved, **whether because the public concerned did not have the opportunity to comment on the project or whether because the impact of the project on the environment was not assessed or not assessed in full, it cannot be denied that there is a real possibility that a different decision might have been reached.**'

Therefore, if an essential element of the public participation was not carried out, it must be presumed that this had a bearing on the outcome of the decision and, thus, is actionable before a court.

Subsequently, the Bayerische Verwaltungsgerichtshof (Bavarian Higher Administrative Court) expanded on that reasoning, holding that 'the possibility that a different decision might have been reached following an environmental impact assessment may only be denied where specific conditions are satisfied' (judgment of 12 March 2008, case no.: 22 CS 07.2027).

Applying the same principles and having regard to the Aarhus Convention, the Hessische Verwaltungsgerichtshof (Higher Administrative Court for Hesse) concluded also that, at the very least, the essential elements of public participation established in article 6 of the Aarhus Convention, that is, giving notice of the project, the canvassing of objections and/or the publication of the approval decision must be carried out (judgment of 24 September 2008, case no.: 6 C 1600.07.T). Prior to the Environmental Appeals Act entering into force, the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court for Rheinland-Pfalz) held that case-law of the ECJ and Directive 2003/35/EC, adopted in light of the Aarhus Convention, required an omission to carry out the necessary public participation procedure to be actionable at the request of a plaintiff (judgment of 25 January 2005, case no.: 7 B 12114/04). The Federal Government is altogether unaware of any more recent decision of a higher administrative court or the Federal Administrative Court in which, in circumstances where an environmental impact assessment was mandatory, an omission to ensure public participation was regarded as irrelevant to the decision.

Finally, in adopting section 4 of the Environmental Appeals Act, the legislature emphasised that inadequately reasoned preliminary assessments rejecting the necessity for an environmental impact assessment are to be included in the same category as environmental impact assessments which are required but have not been carried out. In doing so, it resolved the dispute in the case-law prior to the legislation's entry into force concerning the

categorisation of these cases. In contrast, procedural errors during the implementation of an environmental impact assessment are not overly relevant in Germany.

(2) The requirements of section 2 (1) no. 1 and section 2 (5) no. 1 of the Environmental Appeals Act

Also unfounded is the allegation set out in the communication that section 2 (1) no. 1 and section 2 (5) no. 1 of the Environmental Appeals Act contravene the Aarhus Convention. Those provisions merely ensure that the courts do not take account of provisions which are irrelevant for the decision.

Section 2 (1) no. 1 and section 2 (5) no. 1 pursue the same objective. Section 2 (1) no. 1 establishes a condition of admissibility which is reflected, in relation to the merits, in section 2 (5) no. 1. Consequently, a court may only examine such infringements as are actionable.

Section 2 (1) no. 1 and section 2 (5) no. 1 of the Environmental Appeals Act must be distinguished from section 46 of the Administrative Procedures Act. Section 2 of the Environmental Appeals Act establishes that actions for review are only to be regarded as admissible and well-founded **to the extent that the decision infringes a legal provision which is relevant thereto**. Therefore, unlike section 46 of the Administrative Procedures Act, section 2 of the Environmental Appeals Act does **not** concern the question whether **the infringement itself is relevant to the decision** but whether the legal provision which has been infringed is of any relevance whatsoever to the decision. Consequently, the provision aims simply to exclude any possibility to challenge an infringement of provisions which are irrelevant. It ensures that the court applies the same yardstick as the authority was required to do. This cannot constitute an infringement of article 9, paragraph 2, of the Aarhus Convention as that provision requires a review of the authority's decision. This is precisely what section 2 (1) no. 1 and section 2 (5) no. 1 of the Environmental Appeals Act establish.

Finally, also the contention made in the communication that the relationship between section 4 and section 2 (5) no. 1 of the Environmental Appeals Act is apt to result in legal uncertainty is incorrect. Section 4 of the Environmental Appeals Act lays down clearly and unambiguously that a decision must be reversed if a necessary environmental impact assessment was not carried out. This accords environmental associations and private individuals a priority right to challenge an omission to carry out a necessary environmental impact assessment and to ensure that such is carried out. That provision is not undermined by the requirements of section 2 (5) of the Environmental Appeals Act but, according to the clear scheme of the statute, constitutes – in relation to section 2 (5) of the Environmental Appeals Act – a more specific provision. This approach to the Environmental Appeals Act has been adopted also in the abovementioned recent case-law. Thus, under German law, the possibility is precluded that a court may declare an action as admissible but not well-founded on the basis that section 4 of the Environmental Appeals Act was irrelevant to the decision subject to article 6 of the Aarhus Convention, that is, in relation to projects for which an environmental impact assessment is mandatory.

Point 5: restricting the rights of review of environmental organizations to a review of provisions which establish personal rights for individuals

In the communication, the allegation is levelled against the Federal Republic of Germany that the standing accorded to environmental organizations under the Environmental Appeals Act is incompatible with article 9, paragraph 2, of the Aarhus Convention. According to section 2 (1) of the Environmental Appeals Act, an appeal brought by an environmental organization is admissible only if that party asserts that the decision contravenes legislative provisions which confer individual rights. The same restriction applies under section 2 (5) of the Environmental Appeals Act in relation to the merits of any appeal brought by an environmental organization. According to the communicant, as a consequence of this linking of appeals brought by environmental organizations to the infringement of legislative provisions conferring individual rights, environmental organizations can, in effect, only bring an appeal where an individual, whose rights have been infringed, could also bring that appeal. In its view, this restricts the legal possibilities for environmental organizations to obtain judicial review of the decisions, acts or omissions mentioned in article 6 of the Aarhus Convention although such restriction does not follow from article 9, paragraph 2, of the Aarhus Convention. It concedes that article 9, paragraph 2, of the Aarhus Convention establishes that access to judicial review may be governed by the condition of having a sufficient interest or maintaining the impairment of a right. It notes, in that regard, that the substance of those conditions must be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice. However, as article 9, paragraph 2, subparagraph 2, third sentence, of the Aarhus Convention explicitly provides that environmental organizations shall be deemed to have rights capable of being impaired for the abovementioned purpose, a Party is precluded from adopting limitations in that regard as a matter of national law. Consequently, the communicant argues, the right of environmental organizations to access the courts cannot be made conditional, as a matter of national law, on the infringement of legislative provisions which confer rights on individuals.

In March 2009, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for North Rhine-Westphalia) made a reference to the ECJ for a preliminary ruling on a question similar to the abovementioned allegation set out in the communication. By its question, the court sought to establish whether the abovementioned condition governing the right of environmental organizations to access the German courts was compatible with the Community law measures transposing (on an almost word-for-word basis) the Aarhus Convention in the area of access to justice (Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175, p. 40, as amended by Directive 2003/35/EC, OJ 2003 L 156, p. 17).

In its judgment in Case C-115/09 *Trianel Kohlekraftwerk Lünen*, OJ 2011 C 204, p. 6, the Court of Justice held that the condition imposed by the Environmental Appeals Act governing the right of environmental organizations to access the courts is incompatible with the final sentence of the third paragraph of Article 10a of Directive 85/337/EC which has almost the same wording as article 9, paragraph 2, subparagraph 2, third sentence of the Aarhus Convention. It stated in paragraph 46 of the judgment that ‘it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle

of effectiveness if such organizations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. ... [T]hat very largely deprives those organisations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.' Thus, at any rate in relation to European Union law, to which the assessment of the ECJ was limited, the rights capable of being impaired which the environmental organizations are supposed to enjoy and on which, therefore, access to the courts may be based 'necessarily include the rules of national law implementing EU environmental law and the rules of EU environmental law having direct effect' (paragraph 48). To that extent, the Environmental Appeals Act fails to fully transpose the requirements of EU law. In addition, as the EU law requirements governing access to the courts for environmental associations established in the final two sentences of the third paragraph of Article 10a of Directive 85/337 are unconditional and sufficiently precise, the ECJ held Article 10a of Directive 85/337 to have direct effect. Therefore, for now, environmental organizations have access to German courts directly on the basis of Article 10a of Directive 85/337 to challenge the infringement of environmental provisions which are derived from EU law.

At the same time, as a consequence of this judgment, the provisions of the Environmental Appeals Act governing access to the courts for environmental organizations will require amendment. The detailed amendments necessary – in the light of EU law and international law requirements – are currently under consideration by the Federal Government.

b. No infringement of article 9, paragraphs 3 and 4, of the Aarhus Convention

In addition, the communication regards German law as contravening article 9, paragraph 3, (in part, in conjunction with paragraph 4) of the Aarhus Convention. It is alleged that, in Germany, environmental organizations only have the possibility to challenge acts and omissions of private persons which contravene German environmental law where their own rights have been infringed. This is said to constitute an impermissible restriction as the conditions which an environmental organization must satisfy in order to bring a claim are already established in section 3 of the Environmental Appeals Act.

More specifically, it is contended that the Federal Republic of Germany, following ratification of the Aarhus Convention, did not amend its law on this point. However, according to the communicant, the *effet utile* of article 9, paragraphs 3 and 4, of the Aarhus Convention requires precisely that. It argues, in paragraph 49 of the communication, that article 9, paragraph 3, of the Aarhus Convention must result in new legal provisions and cannot be ignored such that, as a consequence, national law remains unchanged. And, in paragraph 51, it contends that complete inactivity does not constitute a legitimate interpretation of the convention article.

This contention is unjustified. The communication misinterprets, most importantly, the requirements of article 9, paragraph 3, of the Aarhus Convention. The laws of the Federal Republic of Germany ensure effective legal protection for the public in the field of

environmental protection as required by article 9, paragraphs 3 and 4, of the Aarhus Convention. To the extent that the legislation establishes a restriction with regard to the contravention of legal provisions, namely, that these must confer individual rights, this constitutes a permissible requirement under national law.

(1) Article 9, paragraph 3, of the Aarhus Convention

Article 9, paragraph 3, of the Aarhus Convention is worded:

> 'In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.'

(a) Differences between article 9, paragraph 3, and article 9, paragraph 2, of the Aarhus Convention

Article 9, paragraph 3, of the Aarhus Convention differs considerably from article 9, paragraph 2, as regards its requirements, the degree to which its obligations are binding and the discretion on implementation accorded to the Parties. Regard must be had to those differences in the assessment and interpretation of article 9, paragraph 3, of the Aarhus Convention.

Members of the public

First, paragraph 3 refers simply to members of 'the public' and not the 'public concerned'. Accordingly, the privilege accorded to non-governmental organizations under article 2, paragraph 5, of the Aarhus Convention does not apply. Although, pursuant to article 2, paragraph 4, of the Aarhus Convention, associations are also included in the notion of 'the public', they must be treated according to the same rules as the remainder of the public. Thus, they are not accorded any kind of special treatment which could be relevant to their standing before the courts.

Access to administrative or judicial procedures

In addition, paragraph 3 provides for the access to administrative **or** judicial procedures. Consequently, according to that provision, where the possibility exists to challenge acts and omissions by private persons and public authorities before the authorities, this is deemed to suffice. Therefore, when considering the situation in a Contracting State, both the possibilities for the public to challenge an act before the courts and the opportunities to have recourse to the authorities must be included.

'where they meet the criteria, if any, laid down in its national law'

Finally, paragraph 3 expressly provides that the public must satisfy the criteria laid down in national law. This formulation is significant and is misinterpreted in the communication in two different respects.

First, this is not a reference to the same criteria as those mentioned in article 2, paragraph 5, of the Aarhus Convention (although paragraph 47 of the communication appears to suggest this). Article 2, paragraph 5, of the Aarhus Convention specifically does not apply to 'the public' within the meaning of article 9, paragraph 3, of the Aarhus Convention but simply to article 9, paragraph 2, which refers to the 'public concerned'. For that reason, it cannot be contended that section 3 of the Environmental Appeals Act laid down the criteria in national law. These relate simply to the access to courts provided for in article 9, paragraph 2, of the Aarhus Convention. The communication itself emphasises in paragraph 53 that the provisions adopted to implement article 9, paragraph 2, are independent of the transposition of article 9, paragraph 3.

Second, article 9, paragraph 3, refers to the 'criteria ... **laid down** in its national law'. Thus, in transposing the provision, a Party may rely, in general, on criteria already existing in national law and, contrary to the communication's contention, is not obliged to amend its national legislation in that regard. As regards the criteria laid down in national law, a Party enjoys considerable discretion. This is evident both from paragraph 14 of decision II/2 of 8 June 2005 (ECE/MP.PP/2005/2/Add.3) and from the observations of the Compliance Committee with regard to compliance by Belgium (Report of the Compliance Committee to the Meeting of the Parties (ECE/MP.PP/C.1/2006/4/Add.2)) and reiterated in the findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union (ECE/MP.PP/C.1/2011/4/Add.1, paragraph 77).

Paragraph 14 of decision II/2 is worded:

> 'Stresses that, according to article 9, paragraph 3, it is for each Party to determine the criteria, if any, which must be met by members of the public in order to have access to administrative or judicial procedures within the scope of that paragraph.'

That is expanded on in paragraph 16 of that decision:

> 'Invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, to take fully into account the objective of the Convention to guarantee access to justice.'

Those requirements reflect the observations of the Compliance Committee in paragraph 35 of its findings and recommendations with regard to compliance by Belgium:

> 'While referring to "the criteria, if any, laid down in national law", the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice.'

It follows from that that each Contracting State has the freedom to lay down criteria. The limits to the discretion accorded to each Party are to be found at the point where those criteria render legal action impossible.

Requirement on the Parties to take action

Finally, it must be pointed out that article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Aarhus Convention specifically does not require the Contracting States to

take action at all costs. The contention in the communication that complete inactivity in relation to that provision does not constitute a legitimate interpretation (paragraph 51) is misconceived. The requirement directed to the Parties is that they 'shall ensure that ...'. That wording unambiguously includes the possibility of inactivity to the extent that the requirements of the provision are already satisfied by the law of the Party prior to ratification of the Aarhus Convention. The purpose of the provision is quite specifically not to establish that 'every Party does something' but to ensure that minimum standards are achieved in all Contracting States. Consequently, it is only natural that some Contracting States will already satisfy the requirements.

(b) The situation in the Federal Republic of Germany

In compliance with article 9, paragraph 3, of the Aarhus Convention, the Federal Republic of Germany has a coherent and effective set of administrative law, civil law and criminal law rules by which an individual or an association of persons may require the observance of environment-related provisions of German law and challenge an infringement of those provisions by the authorities or private persons.

Administrative law

Any person who can claim that his own rights have been infringed (which in an individual case may apply also to associations) may lodge an **administrative law appeal** challenging the decision of an authority or its omission to take certain measures. This also applies where an authority omits to take measures against third parties which have infringed environmental law provisions. This applies both to administrative appeals and actions before a court. The administrative appeal procedure provided for in the Verwaltungsgerichtsordnung (Rules of Procedure of the Administrative Courts) is a complaints procedure which precedes an action, if any, before the courts, in which, as a purely internal matter within the administration, a review is carried out, as a general rule, by a superior body, to assess the legality and appropriateness of the authority's measure.

Within the framework of individual legal protection in Germany, a challenge may be brought contesting the infringement of any provision which either exclusively or, in parallel to the general interest pursued, at least, on an additional basis, is intended to ensure the protection of individual interests. For example, under anti-pollution law, those persons whose health is affected by the harmful environmental effects of an industrial plant may assert an infringement of the provisions intended to ensure their protection.

In addition, associations also have a more extensive possibility to bring an action, not requiring the assertion of an infringement of their own rights, for example, within the scope of article 9, paragraph 3, of the Aarhus Convention, in the area of nature conservation and the remedying of environmental damage within the meaning of Directive 2004/35/EC. Thus, in both of those areas, recognised non-governmental organizations may bring collective actions to enforce general norms. The Federal Republic of Germany introduced the majority of these possibilities to bring an action following the entry into force of the Aarhus Convention and,

consequently, this may certainly be regarded as moving away from the previous legal position and towards wider access to the courts for environmental associations.

Moreover, every natural or legal person has the possibility to notify the environmental protection authorities of an environmental law infringement by a private person. In those circumstances, according to the German law on administrative procedure, the environmental protection authorities are obliged to take a decision on further measures.

Finally, the **right of petition** guaranteed by Article 17 of the Grundgesetz (Basic Law) ensures that every person has the right at all times to address written requests or complaints to the competent authorities and to the legislature. Accordingly, all individuals and environmental associations, too, have the right to have a request made by petition examined. If the body to whom the petition was addressed does not react, an action may be brought before the courts requiring a reply.

Civil law and criminal law

The abovementioned provisions are supplemented by protection established under civil and criminal law.

Civil law establishes the right to take action against a third party in the civil courts in order to obtain suspensory or prohibitory relief and damages where that third party, in violation of environmental provisions intended, in addition, to protect the person concerned, infringes a fundamental legal right of that person.

For the purposes of the protection of the environment, **criminal law** includes a series of provisions which make it a criminal offence to harm environmental media (water, soil, air, fauna and flora).

(c) Compliance with the requirements of article 9, paragraph 3, of the Aarhus Convention

The possibilities for legal protection mentioned satisfy the requirements of the Aarhus Convention. To the extent that for the purposes of bringing an action German law requires an infringement of legal provisions which at least, in addition, are intended to protect individual interests (known in German as 'drittschützende Normen' (provisions protecting third parties)), this constitutes a criterion laid down in German law within the meaning of article 9, paragraph 3, of the Aarhus Convention. That criterion reflects the legal tradition of German administrative law. It does not undermine the approach of article 9, paragraph 3, of the Aarhus Convention but falls within the scope of the discretion accorded to a Party to lay down its own criteria. Article 9, paragraph 3, does not require the Federal Republic of Germany to abandon that criterion.

(d) Case-law developments

Moreover, regard should be had to the trend amongst the German courts to expand the set of provisions which are regarded as promoting the protection of individual interests. To that

extent, it is incorrect to state – as asserted in the communication – that no changes have occurred in Germany since the Aarhus Convention entered into force.

That trend is reflected in the decision of the Bundesverfassungsgericht (Federal Constitutional Court) of 29 January 2009 (case no: 1 BvR 2524/06). In that case, the court deemed provisions under the law on atomic energy governing the issue of a permit for the transport of nuclear fuels by reference to the risks involved as protective of third parties living close to the transport route notwithstanding the fact that previous decisions, issued under anti-pollution provisions, had only recognised those protective effects in relation to persons who were exposed to the pollutant for a certain period. This decision demonstrates that the issue of third-party protection is constantly under discussion in environmental law and, also, is undergoing change.

Crucial to that development is the influence of Community law as evidenced by the ECJ judgment in Case C-237/07 *Janacek* [2008] ECR I-6221, a reference for a preliminary ruling lodged by the Federal Administrative Court. In that case, the Court of Justice confirmed the entitlement of an individual to require an air quality action plan to be drawn up in the event that the thresholds established are exceeded. That constituted a clear extension to the set of provisions regarded as according third-party protection. Namely, hitherto, under German law, the right to require such a plan to be drawn up had not been recognised.

(2) Article 9, paragraph 4, of the Aarhus Convention

To the extent that the communication criticises also the implementation of article 9, paragraph 4, of the Aarhus Convention, this must be rejected. German law satisfies all the requirements of article 9, paragraph 4.

Article 9, paragraph 4, of the Aarhus Convention is worded:

> 'In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.'

The provisions of the **Rules of Procedure of the Administrative Courts** and the **Zivilprozessordnung (Rules of Procedure of the Civil Courts)** ensure **effective legal protection**. In cases before the administrative courts, if the action is well-founded, the decision of the authority will be set aside or the authority will be ordered to reassess the matter taking account of the legal view expressed by the court and/or to take the action requested by the applicant. Court judgments may be enforced by means of enforcement orders.

The **costs** of actions before the administrative courts in environmental law matters are not prohibitively high. As a rule, they are not determined according to the full economic interest attaching to the contested decision of the public authority. Out of concern for environmental associations, the financial value of the action, according to which costs are calculated, is set at the lower limit of the costing band usually applied to actions of that kind (see the decision of

the Higher Administrative Court for North Rhine-Westphalia of 30 April 2008, case no.: 8 D 20/08.AK). This ensures that a review action is not 'prohibitively expensive' within the meaning of article 9, paragraph 4, of the Aarhus Convention. German law also provides for a legal aid scheme (section 114 et seqq. of the Rules of Procedure of the Civil Courts) as a mechanism of financial support, which applies correspondingly in administrative law cases (section 166 of the Rules of Procedure of the Administrative Courts), to ensure that persons with modest economic resources can bring a court action.

Pursuant to sections 80, 80a and 123 of the Rules of Procedure of the Administrative Courts, **interim protection** is always ensured. In particular, this means that the lodging of an appeal will, as a rule, have a suspensory effect unless in an individual case the law or the court determines otherwise.

Under German law, administrative decisions which are amenable to challenge include, as a rule, a statement indicating the possibilities available to challenge the decision and setting out the relevant time-limits and formalities. Pursuant to section 59 of the Rules of Procedure of the Administrative Courts, statements on the possibilities to bring a challenge are expressly required in the case of federal authorities.

II. Response to the questions of the Compliance Committee of 16 January 2009

The text below provides an answer to the supplementary questions raised by the Compliance Committee to the extent that the answer does not already follow from the response set out above.

Questions 1-3

Obligation on German courts to interpret German law in light of international obligations

As a result of ratification by Germany, an international treaty becomes part of German law. If the treaty includes provisions which relate to matters governed by federal legislation, ratification requires the consent of the legislature given through the adoption of a law of ratification (Article 59 (2), first sentence, of the Basic Law). By way of the Law of 9 December 2006, Germany ratified the Aarhus Convention which entered into force for Germany on 15 April 2007.

However, the fact that the Aarhus Convention became part of German law did not result in the Convention's direct applicability in the Federal Republic of Germany as, in light of its wording, purpose and substance, it cannot be regarded as 'self-executing'. In order to render the provisions of the Convention directly applicable in Germany, as regards article 9, paragraph 2, of the Aarhus Convention the Environmental Appeals Act was adopted.

Thus, the courts now apply as a matter of priority this national law instrument. As a result of its amenability to international law sources, German law must be interpreted in conformity with international law, that is, German courts must interpret national legislation in light of international obligations. Consequently, the Environmental Appeals Act must be interpreted in conformity with the Aarhus Convention and other international obligations.

Consideration given to the Aarhus Convention by German courts

By reason of that obligation to interpret national law in conformity with international law, the German courts have considered the Aarhus Convention in many decisions. Given that Article 10a of Directive 85/337 as inserted by Directive 2003/35 has a wording almost identical to article 9, paragraph 2, of the Aarhus Convention, for the purposes of interpretation, certain courts have referred in addition (or exclusively) to that Community law provision.

Prior to the Environmental Appeals Act entering into force, the courts considered whether article 9, paragraph 2, of the Aarhus Convention or Article 10a of Directive 85/337 as inserted by Directive 2003/35 were directly applicable in German law. That was uniformly rejected (see Bavarian Higher Administrative Court, judgment of 20 May 2005, case no.: 22 CS 05.602; Verwaltungsgericht Berlin (Berlin Administrative Court), judgment of 6 May 2004, case no.: 14 A 17.04; Verwaltungsgericht Hamburg (Hamburg Administrative Court), judgment of 1 December 2003, case no.: 19 K 2474/2003).

After the Environmental Appeals Act entered into force, the courts considered whether German law had to be interpreted in conformity with international law to give effect to the Aarhus Convention (and/or Community law) or whether it possibly infringed the Aarhus Convention (and/or Community law). In principle, all the courts which have had to consider the Environmental Appeals Act have in difficult cases examined its compatibility with the Aarhus Convention (and/or Article 10a of Directive 85/337 as inserted by Directive 2003/35). Both in their interpretation of the Environmental Appeals Act and on the question of its compatibility with the Aarhus Convention (and/or Community law), they have reached different outcomes.

Application of the Environmental Appeals Act by German courts

The Environmental Appeals Act entered into force on 15 December 2006. It applies to all procedures which commenced after 25 June 2005. Thus, the Environmental Appeals Act has been central to many administrative court judgments. However, as is often the case with a new law, these judgments are not uniform. In particular, various higher administrative courts have given different interpretations to the relevant provisions of the Environmental Appeals Act and reached different conclusions on their compatibility with European Union law and the Aarhus Convention. Moreover, the administrative court judgments delivered hitherto result only from the two lower tiers of the three-tiered system of administrative courts in Germany, that is, from the first-level administrative courts and second-level higher administrative courts. No judgment has yet been handed down by the highest administrative court, the Federal Administrative Court. Currently, two cases concerning the Environmental Appeals Act are pending before that court and, as a consequence, it will shortly have the opportunity to take a view on central issues concerning the application and interpretation of the Environmental Appeals Act. Admittedly, also the judgments of the Federal Administrative Court are only binding vis-à-vis the parties concerned. However, as a final court of appeal, it is incumbent on the Federal Administrative Court to ensure uniformity in the law's application. Both the public authorities and the administrative courts should follow the requirements it establishes in its judgment. Finally, the abovementioned ECJ judgment in *Trianel Kohlekraftwerk Lünen*, on a reference from the Higher Administrative Court for North Rhine-Westphalia, has resolved important questions on the interpretation and application of the Environmental Appeals Act and, as a result, future case-law may be expected, in general, to adopt a uniform approach.

Also in relation to section 4 of the Environment Appeals Act there have been divergent decisions. Whilst the judgment of the Higher Administrative Court for Hesse of 24 September 2008 (case no.: 6 C 1600/07.T) appears to suggest that also in relation to section 4 of the Environment Appeals Act (in the case of individual applicants) the applicant must be able to demonstrate reliance on an additional 'individual right', the Oberverwaltungsgericht des Landes Sachsen-Anhalt (Higher Administrative Court for Saxony-Anhalt), having sought to adopt an interpretation in conformity with the Aarhus Convention, regards section 4 of the Environmental Appeals Act as establishing an individual right to have a decision reversed if

an environmental impact assessment has not been carried out (judgment of 17 September 2008, case no.: 2 M 146/08; to the same effect the Verwaltungsgericht Neustadt (Neustadt Administrative Court), judgment of 13 December 2007, case no.: 4 K 1219/06.NW). In its abovementioned judgment, in which it expressed doubts on whether section 4 of the Environment Appeals Act is compatible with the Aarhus Convention, the Higher Administrative Court for Hesse considered, additionally, the relevance of procedural errors (on this issue, see the observations set out above concerning point 4).

Therefore, it may be concluded that the case-law on the Environmental Appeals Act is not entirely uniform. This is not unusual in the case of a new law and, moreover, in the present situation, the courts are faced with the difficult task of integrating the influences of the Aarhus Convention and EU law into the German scheme of legal protection.

However, as soon as the Federal Administrative Court, as the highest administrative court, provides guidance through its case-law, this will be followed by the administrative courts and thus ensure uniform implementation.

Questions 4-7

As regards questions 4 to 7, reference is made to the above observations concerning the communication.