Final version: 13 June 2017

Response of the Federal Republic of Germany to the revised draft findings with regard to communication ACCC/C/2013/92 concerning compliance by Germany

I. Introduction

On 2 June 2017, the Federal Republic of Germany received the draft revised findings of the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) to the communication of Ms. Brigitte Artmann (the communicant).

The Compliance Committee concludes on several allegations made by the Communicant that they are unfounded. We are very pleased that unlike in its previous draft findings and recommendations of 18 November 2016, the Committee finds Germany to be in full compliance with the provisions of the Aarhus Convention. With regard to compliance with Article 3, paragraph 2 of the Convention, the Committee notes:

> "Taking into account that the obligation in article 3, paragraph 2, of the Convention is to "endeavour to ensure" rather than "to ensure", and bearing in mind the factual circumstances of the case, in particular the awareness of the Party concerned that the decision on Hinkley Point C NPP was required to be taken in less than three weeks, and noting the fact that the Party concerned has subsequently informed the United Kingdom that it wishes to be notified for the purposes of a transboundary EIA procedure under the Espoo Convention which will include the opportunity for the public to comment on the project (see para. 36 above), the Committee does not find the Party concerned to be in non-compliance with article 3, paragraph 2, in this case."

By letter of 2 June 2017, the Parties were offered the opportunity to comment on the findings through Wednesday, 14 June 2017, noon. The Federal Government thanks the Compliance Committee for the possibility to provide comments.

II. General/ formal remarks

1. On paragraph 8: The Federal Government kindly requests the Compliance Committee to add that the Federal Government provided its comments to the draft findings and recommendations on 20 January 2017.
2. On paragraph 56/57: With respect to the Parties' arguments, paragraphs 35 and 36 of the draft findings and recommendations of November 2016 contained a summary of an argument brought forward by the Federal Government in its response of 15 April 2014 (page 10, 4th paragraph). In the draft findings and recommendations of November 2016, the argument was accurately identified as "preliminary point", i.e. as a point brought

submitted with regard to the communication as such, before entering in the examination of specific provisions of the Convention. In the revised draft findings however, these two paragraphs were deleted and integrated in the summary of the Federal Government's argumentation regarding a possible violation of Article 6 of the Convention (see revised findings, paragraphs 56 and 57). The Federal Government kindly asks the Compliance Committee to reverse this amendment, as the current version does not reflect anymore the Federal Government's argumentation brought forward in its response of 15 April 2014.

3. On paragraph 86: The Federal Government underlines that the term "affected Party" is a specific term defined by the Espoo Convention, and it should not be used in that context, as Germany is, in the present case, **not** an affected party in the sense of Article 1 (iii) of the Espoo Convention.
4. On paragraphs 89/90 et seq: In its revised draft findings the Committee does not consider the strong interest of the public as „indication that the Party should call… for entering into the transboundary procedure", but only as "relevant consideration to be taken into account …" when deciding whether to enter into the transboundary procedure in case the Party has been notified by the State of Origin. Thus, it is necessary to adapt the wording in paragraph 89 of the revised draft findings respectively by deleting "by itself requesting to enter into a transboundary procedure".
5. On paragraph 91: The Federal Government underlines that the Federal Government has neither formally nor informally been notified by the UK. Thus, the Federal Government requests the Compliance Committee to delete the term "formally" in the first sentence.

III. Substantive comments on the revised draft findings of the Compliance Committee

1. The Federal Government is very pleased with the revised draft findings, which confirm that the Federal Republic of Germany acted in full compliance with its obligations under the Convention. The Federal Government very much appreciates that the Compliance Committee took account of many of the comments submitted in January 2017.
2. While the Federal Government shares the Committee's findings that the Federal Republic of Germany is in full compliance with the provisions of the Convention, the Federal Government still has concerns about the Committee's legal assessment of the relationship of the respective obligations of the Aarhus Convention and the Espoo Convention as well as about the Committee's interpretation of the scope of Article 3, paragraph 2 of the Convention from a horizontal point of view.

3. In this respect, the Federal Government shares the Committee's view that the same facts may trigger different obligations under the different domestic or international legal regimes (see paragraph 84). This fact has never been doubted by the Federal Government. However, the Federal Government does not believe that this statement properly reflects the legal situation at hand: The question is not whether the same fact triggers different obligations under the Aarhus and Espoo Convention, but the question is rather whether the lawful exercise of a right under the Espoo Convention may, at the same time, amount to a violation of an obligation under the Aarhus Convention. In the present case, the lawful decision not to make use of a State's rights under Article 3, paragraph 7 of the Espoo Convention, may not be turned into a violation of this State's obligation under Article 3, paragraph 2 of the Convention. In this context, the Federal Government notes that the interpretation of the rights under the Espoo Convention is a task that is exclusively assigned to the Espoo Convention Implementation Committee, and not to the Compliance Committee. Likewise, by interpreting the provisions of the Aarhus Convention, possible conflicts of norms, which have been both developed under the auspices of the UN ECE, should be avoided.
4. On paragraphs 83-85: The Federal Government is still of the opinion that the Committee, by expanding the ambit of Article 3, paragraph 2 of the Convention to transboundary procedures, overstretched the wording as well as object and purpose of the provision: The provision poses an obligation on the Contracting Parties to facilitate the exercise of the citizens' rights derived from the Aarhus Convention, i.e. the rights enshrined in the three pillars of the convention. Yet, as the second pillar of the Aarhus Convention does not regulate the law on transboundary EIA procedure, but exclusively the law on public participation in decision-making of the territorial State, Article 3, paragraph 2 of the Convention may not be interpreted as obliging States to facilitate the participation in transboundary decision-making procedures. In other words: There is no primary obligation arising out of one of the three pillars of the Convention, on which the obligation of conduct could be annexed to.
5. On paragraphs 88-92: The Federal Government notes that the Compliance Committee, when assessing the obligations under Article 3, paragraph 2 of the Convention, distinguishes the situation of a notification from the situation where no notification has taken place. Although, in general, the Federal Government welcomes this distinction, it notes with concern that in both situations, the Committee in fact imposes obligations on the Contracting Party which go beyond the requirements of the Espoo Convention (see paragraph 3 for the Federal Government's general position). This is also true for the assessment of the obligations of Contracting Parties in case no notification was provided.

Recent case law of the Espoo Convention Implementation Committee shows that the mere unofficial contact of a State with the State of Origin means that the former exercises its rights under Article 3, paragraph 7 of the Espoo Convention (see Draft decision VII/2, para. 5.(a), Doc. ECE/MP.EIA/2017/8). Again: The Federal Government has strong concerns that the Compliance Committee transforms the exercise of a *right* under the Espoo Convention into an *obligation*. But even if these specific obligations mentioned in paragraph 92 would not qualify as steps under Article 3, paragraph 7 of the Espoo Convention, the Federal Government still has doubts whether members of the public might misunderstand the statements of the Compliance Committee in a way that they might demand, from a Contracting Party, to make use of its right under Article 3, paragraph 7 of the Espoo Convention. Thus, the Federal Government would be grateful if the Compliance Committee could clarify that point.

6. On paragraph 92: Regarding the obligations mentioned in paragraph 92, the Federal Government underlines first that in cases where no notification has been provided, the Party usually has no information whatsoever available. Second, some of the formulations of the Committee are too vague. Does "contact person" mean the Espoo Contact, or does it mean the authority competent for the national EIA procedure? Which links have to be provided, and what if the links are available only in a foreign language other than in English? It seems totally unclear how the obligation of Article 3, paragraph 2 of the Convention could be met in the view of the Committee if the links are available only in a foreign language.
7. Irrespective of the general position of the Federal Government explained above (paragraphs 4 and 5), the Federal Government also objects to the Committee's interpretation that the obligation under Article 3, paragraph 2 of the Convention would go as far as contacting the State of origin or even actively collecting information (see in more details comments of 20 January 2017). It is sufficient, in the view of the Federal Government, that a State, having been contacted by a member of the public in the situation of non-notification, provides the person with all information it has at its disposal, including the name of the contact person of the Espoo Convention. In the view of the Federal Government, this interpretation of Article 3, paragraph 2 of the Convention would be not only be the essence of "endeavor to ensure that officials and authorities assist and provide guidance to the public … in facilitating the participation in decision making", but it would at the same time not touch upon the rights and duties of States under the Espoo Convention.
8. Finally, the Federal Government underlines that given the specific circumstances of the case, which deals with questions of EIA procedures in the field of nuclear energy, the

legal assessment of the Committee cannot be transferred to other EIA procedures as such, and kindly asks the Compliance Committee to clarify this point.

9. As regards the comments provided by the Communicant on 12 June 2017, the Federal Government notes that it shares neither the legal nor the factual arguments; we hereby refer to our previous comments provided on 15 April 2014 and on 20 January 2017.