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Communication to the Aarhus Convention Compliance Committee concerning compliance by Germany (PRE/ACCC/C/2018/160)

Consideration of the preliminary admissibility

Berlin, 26 October 2018

Dear Ms. Marshall,

We thank for the information on a communication concerning compliance by Germany submitted by the Federal Association of German Environmental Aid (*Deutsche Umwelthilfe e.V.*) on 9 April 2018. The Federal Government would like to participate via audio-conference during the consideration of the preliminary admissibility by the Compliance Committee in its 62nd session.

Furthermore, we take the opportunity for some preliminary, non-exhaustive comments on the communication that might be of relevance for the consideration of the preliminary admissibility of communication PRE/ACCC/C/2018/160.

The Federal Republic of Germany has doubts concerning the admissibility of the communication, since the communicant has not exhausted domestic remedies yet. The admissibility of the communication is to be determined by the Compliance Committee of the Aarhus Convention *inter alia* in accordance with paragraph 21 of the annex to decision I/7 (Review of Compliance) adopted at the first meeting of the Parties. According to paragraph 21, the Committee

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

1. The communicant bases its assertions mainly on two decisions taken by German administrative courts of first instance (Schleswig and Düsseldorf), where the communicant had started legal proceedings aiming at the withdrawal of type approvals of vehicles. These administrative court proceedings are currently pending before the Higher Administrative Courts of Schleswig-Holstein and North Rhine-Westphalia, because the communicant has appealed the first instance judgments. The Federal Government expects that oral hearings in the courts of second instance be held in the course of 2019.
2. In this context, the Federal Government would like to hint the ACCC to recent judgments both by the European Court of Justice and by a German court of first instance, which might call for a different view on the subject matter of the communication. On 18 April 2018 (VG 11 K. 216/179), the Berlin administrative court found the action of an environmental NGO in a comparable case to be **admissible**. The subject matter of that case was similar to the pending proceedings referred to by the communicant: The plaintiff

had claimed that a specific German road traffic regulation granting exceptions to long vehicles was not in conformity with an EU directive. The Berlin administrative court held that the action was admissible. In its reasoning, it relied on the recent jurisprudence of the European Court of Justice in the case *Protect* (C-664/15, judgment of 20 December 2017), where the ECJ had applied a broad interpretation of Article 9 paragraph 3 of the Aarhus-Convention read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union. The decision of the Berlin administrative court has become final, as neither party appealed it.

3. Given the non-exhaustion of domestic remedies by the communicant, the Federal Government believes that it would be both suitable and efficient to await the outcomes of the ongoing court procedures, rather than addressing the communication at this point of time.
4. The Federal Government underlines in this regard that neither is the "application of the remedy unreasonably prolonged", nor does it "obviously not provide an effective and sufficient means of redress" in the meaning of paragraph 21 of the annex to decision I/7. This holds true both for the German system of administrative court procedure in general as well as for the pending court proceedings in particular. The Federal Government notes that the German system of administrative jurisdiction generally consists of **three instances**: The administrative courts are the courts of first instance, the Higher Administrative Courts are the courts of second instance, the Federal Administrative Court (*Bundesverwaltungsgericht*) is the court of last instance. If a plaintiff wants to appeal a judgment of first instance, the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) provides for an appeal on points of fact and law to the Higher Administrative Court in

case a court admits the appeal.[1] If the plaintiff wants to appeal the second instance judgment, he or she has recourse to the appeal on points of law to the Federal Administrative Court[2].

5. In other terms: The fact that the communicant has to appeal before the Higher Administrative Courts instead of bringing the cases to the Federal Administrative Court directly corresponds to the principle of three instances of the German administrative court system.
6. In the view of the Federal Government, there are also no indications that the proceedings will take longer than the average proceedings before German courts do.
7. The Federal Government also rejects the communicant's assertion that the pending administrative court proceedings take longer "than would have been necessary" (communication, p. 5). Exceptionally, and if admitted by the administrative court, parties may give their consent to a direct appeal on points of law, thus skipping the second instance, which serves as a second instance competent to determine the facts of a case.[3] Yet, in the cases referred to by the communicant, both defendants did not give their consent to that direct appeal, thus exercising their right to proceedings in a second instance. With regard to the Schleswig case and as far as the Federal Government is aware, the defendant did not give its consent because in the court proceedings of first instance, questions of the substantive legality of the case had only been touched upon, but not been discussed in depth. Thus, the defendant wanted to reserve the possibility to discuss questions of substantive law not only before the court of last resort. Regarding the pending case be-

[1] Section 124 of the German Code of Administrative Procedure (*Verwaltungsgerichtsordnung*), English version available at https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.pdf.
[2] Section 132 of the German Code of Administrative Court Procedure.
[3] See section 134 of the German Code of Administrative Procedure

fore the Higher Administrative Court of North Rhine-Westphalia, the Federal Government has no information on the reason why the defendant did not give its consent to direct appeal.

8. In other cases, the ACCC has already made use of its discretion and declared communications inadmissible for lack of exhaustion of domestic remedies. Besides the cases where communicants did not make use of domestic remedies at all, there are also cases where the Committee declared a communication inadmissible because the appeal was pending. In fact, in a case concerning compliance by Armenia, the Committee had decided "*to exercise its discretion given to it under paragraph 21 of the annex to decision I/7 not to consider the communication further, as the matter has just been submitted for review by the domestic court of appeals*"[4]. This scenario exactly corresponds to the underlying facts of the present communication.
9. In decision V/9, the 5th Meeting of the Parties had noted that „*the Committee should ensure that, where domestic remedies have not been utilized and exhausted, it takes account of such remedies, in accordance with paragraph 21 of the annex to decision I/7"*.[5] At the 6th meeting of the Parties to the Aarhus Convention, the European Union and its Member States welcomed in a statement "that the ACCC is taking [the exhaustion of remedies] into account in their proceedings in accordance with paragraph 21 of decision I/7 and decision V/9"[6].
10. In the view of the Federal Government, the Committee should take a similar approach in its assessment of the preliminary admissibility of this communi-

[4] ACCC/2004/9, ACCC, Report of the 5th meeting, MP.PP/C.1/2004/6, para. 28.
[5] Report of the fifth session of the Meeting of the Parties, Addendum, Decisions adopted by the Meeting of the Parties, ECE/MP.PP/2014/2/Add.1, Decision V/9, para. 6 (b).
[6] Statement by the EU and its Member States, http://www.unece.org/env/pp/aarhus/mop6_docs.html, Statements and Comments, 7 (b): Compliance mechanism, Statement by the European Union concerning general issues of compliance, p.1.

cant in accordance with paragraph 21 of the annex to decision I/7 and decision V/9. Thus, it should take into account that there are court proceedings pending before German courts and that the communicant has not exhausted domestic remedies yet.

Yours sincerely,

For the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety

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