Version: 15 March 2017

Fourth Progress Report by the Federal Government concerning the implementation of decision V/9h on compliance by the Federal Republic of Germany with obligations under the UN ECE Aarhus Convention

I. Introduction

At its fifth session, the Meeting of the Parties to the UN ECE Aarhus Convention, which was held in Maastricht from 30 June to 2 July 2014, adopted decision V/9h, amongst other things. This decision endorsed the findings of the Compliance Committee with regard to the proceedings on ACCC/C/2008/31, and recommended that Germany

"take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that

(a) NGOs promoting environmental protection can challenge both the substantive and procedural legality of any decision, act or omission subject to article 6 of the Convention, without having to assert that the challenged decision contravenes a legal provision "serving the environment";

(b) Criteria for the standing of NGOs promoting environmental protection, including standing with respect to sectoral environmental laws, to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment under article 9, paragraph 3, of the Convention are revised, in addition to any existing criteria for NGO standing in the Environmental Appeals Act, the Federal Nature Conservation Act and the Environmental Damage Act."

Germany was also invited to submit to the Compliance Committee periodically, for the first time as per the deadline of 31 December 2014 (and on 31 October 2015 and 31 October 2016 thereafter) concerning progress in implementing these recommendations so that it could submit a review report to the sixth session of the Meeting of the Parties in 2017. Germany has complied with the obligation to report on time in all cases.

The Compliance Committee transmitted its second progress review to Germany on 1 February 2017. In paragraphs 61 and 62 of the review, the Committee called on Germany to provide the following information by 15 March 2017:

"(a) Evidence of the legislative, regulatory or administrative measures and practical arrangements already adopted in order to fulfil the requirements of decision V/9h, together with English translations thereof;

(b) Any drafts of legislation or other measures aimed at implementing the requirements of decision V/9h, available at the time of submitting the final progress report, together with English translations thereof, and with an approximate timeline for the procedures leading up to their final adoption;

(c) With regard to paragraph 2(a) of decision V/9h, evidence that the requirement in the EAA, as amended by the "Aarhus amendment", to assert that the challenged decision, act or omission contravenes a legal provision "serving the environment," by way of section 2, subsection (1), last sentence of the EAA or any other provision, is not applicable to any decisions, acts or omissions within the scope of article 6 of the Convention, including article 6, paragraph 1(b). In this context, the Party concerned may also wish to elaborate on whether any decision

under article 6, paragraph 1(b) of the Convention may, in certain circumstances, fall under section 1, subsection (1), sentence 1, number 5 of the EAA without falling under section 1, subsection (1), sentence 1, number 1 of the EAA;

(d) With regard to paragraph 2(b) of decision V/9h:

(i) an explanation of the limitations applicable to section 1, subsection (1), sentence 1, number 4, in particular regarding:

a. The requirement that plans and programmes must be subject to SEA to be subject to review;

b. The specific exclusions in section 1, subsection (1), sentence 3, number 3 of the EAA;

c. The specific exclusions in proposed sections 19b subsection (2) and section 16, subsection (4) of the EIA Act;

(ii) An explanation of the limitations applicable to proposed section 1, subsection (1), sentence 1, number 5 of the EAA, in particular that decisions must relate to the permitting of "projects" ("*Vorhaben*") applying environmental legal provisions ("*unter Anwendung umweltbezogener Rechtsvorschriften*"). This should include clarification of whether this could potentially be interpreted so as to prevent challenges brought concerning projects, which are not subjected to permitting procedures intended to protect the environment, but may nevertheless contradict provisions of national law relating to the environment;

(iii) An explanation of the limitations applicable to proposed section 1 subsection (1), sentence 1, number 6 of the EAA, in particular that decisions must relate to monitoring and supervisory activities applying environmental provisions ("*unter Anwendung umweltbezogener Rechtsvorschriften*") and whether that requirement may be interpreted so as to possibly prevent challenges of monitoring and supervisory measures that are not intended to protect the environment;

(iv) An explanation of the differing scope between section 63 and section 64 of the Nature Conservation Act including clarification as to whether the measures identified in paragraph 50 above would be exempted from review or instead would be reviewable under the provisions of the proposed EAA or some other provisions of national law; and

(v) Information as to the possibilities under the EAA, or any other provisions of national law, for the public to challenge acts and omissions of private persons contravening the Party concerned's law relating to the environment."

The Federal Republic of Germany is pleased to submit the Fourth Progress Report concerning the implementation of decision V/9h in good time.

II. General remarks

1. The Committee summed up in paragraph 18 the open session on decision V/9h, which took place via audio conference during the Committee's fifty-second meeting (8-11 March 2016). The Federal Government would like to correct one detail: It did not state during the audio conference that it had started the process of consultations with the *Länder* and associations on the Environmental Appeals Act, but that it hoped to start the consultations with the *Länder* and associations soon. The consultations with the *Länder* and associations were then started on 19 April 2016; as stated in paragraphs 20 and 21 of the second progress review, the Federal Government reported this to the secretariat of the Compliance Committee by e-mails of 25 April 2016 and 12 May 2016.
2. The Federal Government requests that the following information be included in future statements on the state of the proceedings: The Federal Government furthermore informed the Compliance Committee by e-mail of 23 June 2016 that the Federal Cabinet had adopted a draft bill on 22 June 2016 with slight revisions vis-à-vis the draft presented at the hearing. The Federal Government forwarded an English translation of the Government's draft, in which the amendments that had been made were marked, by e-mail of 8 July 2016. Paragraph 8 only indicates that the Federal Government provided information on these two dates.
3. The Compliance Committee refers in paragraph 32 of the second progress review to Germany's note in its third progress report of 31 October 2016 on the coming into force of the "Altrip" amendment. The Committee's account is not entirely correct: Germany pointed out on page 3 (item 2. b)) that the "Altrip" amendment had entered into force on 26 November 2015 (not: 2016), and referred in this regard to its e-mail communication to the Compliance Committee of 13 April 2016.

II. Regarding the questions of the Compliance Committee (paragraph 61) and the request for an explanation regarding the implementation of Article 9 paragraph 3 of the Aarhus Convention (paragraph 54)

1. Paragraph 61 a +b: State of the legislative procedure

The Federal Government regrets to announce that the Committees of the German Bundestag did not complete their deliberations on the Draft Act on 8 March 2017.

As far as the Federal Government is aware, the committees of the German Bundestag will be shortly holding their final deliberations on the draft bill. In this process, the leading Committee on the Environment, Nature Conservation, Building and Nuclear Safety will recommend to the German Bundestag, as far as the Federal Government is aware, to adopt the draft bill with a small number of amendments. The parliamentary procedure will then be completed by a second hearing in the Bundesrat and its consent to the Act. The Federal Government expects that the Bundesrat will deliberate on the Act at one of its next two sessions, which are scheduled to take place on 12 May 2017 and 7 July 2017.

The Act is then to be certified by the Federal President and promulgated in the Federal Law Gazette (*Bundesgesetzblatt*) (cf. Article 82 paragraph 1 of the Basic Law).

The Federal Government will inform the Committee regularly and promptly of the content and conclusion of the parliamentary procedure, as well as when the Act comes into force.

2. Paragraph 61 (c): Re section 2 subsection (1), last sentence, of the draft Environmental Appeals Act "or any other provision"

"With regard to paragraph 2(a) of decision V/9h, evidence that the requirement in the EAA, as amended by the "Aarhus amendment", to assert that the challenged decision, act or omission contravenes a legal provision "serving the environment," by way of section 2, subsection (1), last sentence of the EAA or any other provision, is not applicable to any decisions, acts or omissions within the scope of article 6 of the Convention, including article 6, paragraph 1(b). In this context, the Party concerned may also wish to elaborate on whether any decision under article 6, paragraph 1(b) of the Convention may, in certain circumstances, fall under section 1, subsection (1), sentence 1, number 5 of the EAA without falling under section 1, subsection (1), sentence 1, number 1 of the EAA;"

Once the amended EAA, which is still in the parliamentary procedure, has come into force, the German provisions on access to justice in environmental matters will be in compliance with the requirements of Article 9 paragraph 2 of the Aarhus Convention.

According to decision V/9h of the fifth session of the Meeting of the Parties, the German provisions failed to comply with article 9, paragraph 2, of the Aarhus Convention by providing that environmental associations had to demonstrate that the challenged decision had contravened a legal provision "serving the environment". The decision specifically related to section 2 subsection (1) number 1 of the EAA, as well as to the parallel provision contained in section 2 subsection (5) number 1 of the EAA. The Federal Government has proposed in order to implement decision V/9h in the Government Draft to delete the

requirement in question from both provisions (see Government draft, pages 6, 40 and 41 [English version]), and has hence comprehensively implemented decision V/9h paragraph 2(a).

a. Regarding the scope of section 1 subsection (1), sentence 2, of the draft Environmental Appeals Act

This provision reads as follows: *"In the case of appeals against a decision in accordance with section 1 subsection (1), sentence 1, numbers 2a to 6, or against omission of such, the association must furthermore assert a violation of environmental legal provisions."*

The Compliance Committee has raised the question as to whether this provision can apply to any decisions to which Article 6 of the Aarhus Convention (and hence Article 9 paragraph 2 of the Aarhus Convention) applies: The answer is **no**.

The provision contained in section 1 subsection (1), sentence 2, of the draft Environmental Appeals Act exclusively applies to decisions falling within the scope of Article 9 paragraph 3 of the Aarhus Convention. It does not apply to decisions under Article 6 of the Aarhus Convention, to which the provision on access to justice of Article 9 paragraph 2 of the Aarhus Convention applies. The Federal Government stated as follows on this matter on page 36 (page 41 of the English version) of the reasoning – Reasoning is used in Germany as an aid in interpretation for the application and enforcement of laws:

> "The addition of the new sentence 2 in section 2 subsection (1) makes it clear that, with regard to appeals against decisions in accordance with section 1 subsection (1) numbers 2a to 6, in concurrence with the requirements of Article 9 paragraph 3 of the UNECE Aarhus Convention, only potential breaches of environmental legal provisions can be complained of and reviewed. Unlike in the scope of Article 9 paragraph 2 of the UNECE Aarhus Convention, in accordance with the explicit wording of Article 9 paragraph 3 of the UNECE Aarhus Convention, this is admissible for decisions which fall within the scope of Article 9 paragraph 3 of the UNECE Aarhus Convention. Reference is made to section 1 subsection (4) of the Environmental Appeals Act with regard to the environmental legal provisions."

The applicability of section 1 subsection (1), sentence 2, of the draft Environmental Appeals Act to decisions under Article 6 of the Aarhus Convention, and hence under Article 9 paragraph 2 of the Aarhus Convention, is ruled out because of the regulatory technique employed in section 1 subsection (1), sentence 1, of the draft Environmental Appeals Act: The provision regulates the scope of the EAA in material terms:

- decisions in accordance with section 1 subsection (1), sentence 1, numbers 1 and 2 of the EAA are those under Article 6, which therefore fall under Article 9 paragraph 2 of the Aarhus Convention; these are primarily projects where an EIA is required in accordance with Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as well as projects falling under Industrial Emissions Directive 2010/75/EU.

- section 1 subsection (1), sentence 1, numbers 2a to 6 of the draft Environmental Appeals Act contain decisions falling under Article 9 paragraph 3 of the Aarhus Convention because they are not decisions under Article 6 of the Aarhus Convention.

Since section 1 subsection (1), sentence 2, of the draft Environmental Appeals Act now refers exclusively to cases under section 1 subsection (1), sentence 1, numbers 2a to 6 of the draft Environmental Appeals Act, the provision does not cover any decisions in accordance with Article 6, and hence in accordance with Article 9 paragraph 2 of the Aarhus Convention.

b. On the question of decisions within the meaning of Article 6 paragraph 1(b) of the Aarhus Convention and section 1 of the EAA

The Compliance Committee has further requested an explanation of whether decisions under Article 6 paragraph 1(b) of the Aarhus Convention might not fall under section 1 subsection (1), sentence 1, number 5 of the draft Environmental Appeals Act – and not under section 1 subsection (1), sentence 1, number 1 of the EAA. The answer is **no**.

In accordance with Article 6 paragraph 1(b) of the Aarhus Convention, the provisions of Article 6 of the Aarhus Convention also apply to activities which are not listed in Annex I of the Aarhus Convention, but *"which may have a significant effect on the environment"*.

The Federal Government considers that Article 6 paragraph 1(b) of the Aarhus Convention is implemented by German law on the EIA. The German provisions on the EIA have a broader scope, and subject more projects to an EIA requirement than would be required by Annex I of the Aarhus Convention. Important examples include projects in the fields of cattle farming and underground cables.

These provisions under Article 6 paragraph 1(b) of the Aarhus Convention hence also fall under section 1 subsection (1), sentence 1, number 1 of the EAA, and hence the provision on access to justice in accordance with Article 9 paragraph 2 of the Aarhus Convention, but not section 1 subsection (1), sentence 1, number 5 of the draft Environmental Appeals Act, which implements the provision on access to justice contained in Article 9 paragraph 3 of the Aarhus Convention.

Were future legal developments to require further projects to be included in the scope of section 1 subsection (1), sentence 1, number 1 of the EAA, the Federal Government will react to this and promptly initiate the appropriate amendments to the provisions.

3. Paragraph 61 (d) (i): Plans and programmes

"…an explanation of the limitations applicable to section 1, subsection (1), sentence 1, number 4, in particular regarding:

a. The requirement that plans and programmes must be subject to SEA to be subject to review;
b. The specific exclusions in section 1, subsection (1), sentence 3, number 3 of the EAA;
c. The specific exclusions in proposed sections 19b subsection (2) and section 16, subsection (4) of the EIA Act"

Re a.

In accordance with section 1 subsection (1), sentence 1, number 4 of the draft Environmental Appeals Act, environmental associations will be able to file suit in future against decisions on the acceptance of plans and programmes for which there may be an obligation to implement a strategic environmental assessment in accordance with Annex 3 of the Environmental Impact Assessment Act or provisions of *Land* law. Only those plans and programmes are excluded from this the acceptance of which is decided upon by means of a formal law. Any case of omission is covered by section 1 subsection (1), sentence 2, of the EAA.

Germany is implementing Article 9 paragraph 3 of the Aarhus Convention with this provision with regard to plans and programmes. The Federal Government holds that access to justice in accordance with Article 9 paragraph 3 of the Aarhus Convention must be ensured with regard to plans and programmes relating to the environment in accordance with Article 7 of the Aarhus Convention. Under German law, plans and programmes relating to the environment in accordance with Article 7 of the Aarhus Convention are those which may require an SEA. Article 7 of the Aarhus Convention was largely transposed at EU level by SEA Directive 2001/42/EC, as well as by Public Participation Directive 2003/35/EC. The plans and programmes named in these directives potentially require an SEA in accordance with German law, and hence are covered via the provisions of German law on SEAs.

Even were it to emerge in an individual case that a plan or programme relating to the environment within the meaning of Article 7 of the Aarhus Convention did not potentially require an SEA in accordance with German law at present, compatibility with Article 9 paragraph 3 of the Aarhus Convention could be created by ordering an SEA requirement in accordance with the law on SEAs.

In the view of the Federal Government, the focussing of section 1 subsection (1), sentence 1, number 4 of the draft Environmental Appeals Act on plans and programmes requiring an SEA serves the enforcement of the provision, and it furthermore also respects the discretion which the Parties have when transposing Article 9 paragraph 3 of the Aarhus Convention. The Compliance Committee itself found in paragraph 92 of its findings and recommendations on the instant proceedings on compliance:

> "Unlike article 9, paragraphs 1 and 2, article 9, paragraph 3, of the Convention applies to a broad range of acts or omissions and also confers greater discretion on Parties when implementing it…. Yet, the criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective

> of the Convention to ensure wide access to justice. Access to such procedures should be the presumption, not the exception, as article 9, paragraph 3, should be read in conjunction with articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced" (…)."

If however the Compliance Committee presumes that the Parties have discretion when it comes to implementation – consideration being given to the principle of broad access to justice and to the fact that access to justice is to be the presumption, not the exception – the consequence is also that the Parties may exercise and exhaust this discretion that is restricted in this way when implementing Article 9 paragraph 3 of the Aarhus Convention.

In the understanding of the Federal Government, the provision contained in section 1 subsection (1), sentence 1, number 4 of the draft Environmental Appeals Act, in accordance with which plans and programmes requiring an SEA can be challenged directly in future, constitutes such exhaustion of the discretion in implementation: The broad majority of all plans and programmes relating to the environment require an SEA, so that it is ensured that the presumption-exception ratio is favourable to access to justice. The general principles apply to plans and programmes not requiring an SEA: These plans and programmes can also be reviewed in court, incidentally in the framework of an action against the decision on admission, which is based on the plan or programme.

Re b.

The Compliance Committee is requesting an explanation of the provision contained in section 1 subsection (1), sentence 3, number 3 of the draft Environmental Appeals Act, containing "specific exclusions".

The Federal Government stresses that these provisions do not contain any "specific exclusions" such that the ability to have specific plans and programmes reviewed in court would be ruled out.[1] Rather, the provision exclusively makes it clear that the specific provisions on the incidental review of specific plans and programmes, which are normed in specific laws, remain untouched. In these cases, it is not the plans and programmes themselves which are the object of the challenge, but the decision taken by the authority based on them. If an action is filed against such a decision, the court can then also review the lawfulness of the plan or programme. Germany considers that this provision, which also secures the presumption-exception ratio of the direct court reviewability of plans and programmes, is within the discretion which the Parties have when implementing Article 9 paragraph 3 of the Aarhus Convention (see above).

[1] Section 1 subsection (1), sentence 3, of the EAA addresses not only certain plans and programmes, but also other decisions, namely the routing determinations in accordance with the Federal Highways Act (*Bundesfernstraßengesetz*) and the Federal Waterways Act (*Bundeswasserstraßengesetz*) (section 15 subsection (5) of the Environmental Impact Assessment Act), as well as the result of the regional planning procedure (section 16 subsection (3) of the Environmental Impact Assessment Act).

As far as the Federal Government is aware, one of the changes which the leading committee will be recommending to the German Bundestag will be the inclusion of section 6 subsection (9) of the Offshore Wind Farming Act (*Windenergie-auf-See-Gesetz – WindSeeG*) in the provision of section 1 subsection (1), sentence 3, number 3 of the draft Environmental Appeals Act. This addition ensures that the special arrangement of the incidental review of the site development plan in accordance with the Offshore Wind Farming Act also comes to bear in the area of application of the amended EAA. The site development plan replaces the offshore federal sectoral plan; the incidental review of the latter is already contained here (section 17a subsection (5), sentence 1, of the Energy Industry Act [EnWG]). The above explanations of the provision contained in section 1 subsection (1), sentence 3, number 3 of the draft Environmental Appeals Act also apply to the site development plan.

Re c.:

The Compliance Committee is requesting an explanation of the provisions contained in sections 19b subsection (2) and 16 subsection (4) of the draft EIA Act which contained "specific exclusions". The Federal Government stresses here too that these provisions do not constitute an exclusion of the possibility to challenge in court the plans and programmes addressed in the provisions. Rather, these provisions regulate that the challengeability of the plans referred to in sections 19b subsection (2) and 16 subsection (4) of the draft EIA Act (namely a specific, clearly-defined part of the plan category regional policy plan as well as transport infrastructure planning at Federal level) is not governed by section 1 subsection (1), sentence 1, number 4 of the draft Environmental Appeals Act, but by general principles. In accordance with these general principles, whilst the plans can be reviewed in court, they themselves are not the object of the challenge, but the zoning plans and approval decisions that are based on them are. If a court action is lodged against such decisions, the court may review the lawfulness of the plan, or if a corresponding complaint is lodged, it indeed must do so. Given the complexity of these plans and programmes, particularly the incidental review proves to be effective since the contents of the plan or programme are now specifically available in the shape of the approval decision.

What is more, the approval decision may derogate from findings in the regional policy plan (see on this amongst others sections 5 and 6 subsection (2) of the Regional Planning Act [*Raumordnungsgesetz*]), so that a direct review of the regional policy plan would also not encompass the actual impact.

Particularly with a view to the wind concentration plans, the provisions on the incidental review serve the purpose of effective environmental protection, and hence the subordinate goal of the Aarhus Convention.

Wind concentration plans cause wind turbines to only be permissible within the plans, and hence the remaining area (far in excess of 98% of the total area in most cases) to remain available for other purposes (also for nature conservation in particular). A direct court challenge would always lead to the opening up of the undesignated outlying area for additional wind turbines, and hence cause a greater strain on a wide variety of natural resources affected. If such a plan is rescinded, the general privilege arrangement for wind

turbines in accordance with section 35 subsection (1) number 5 of the Federal Building Code (BauGB) applies in Germany. Accordingly, wind turbines may as a matter of principle be constructed at any place in the undesignated outlying area with no prior plan unless the project is opposed by public interests in accordance with section 35 subsection (3) of the Federal Building Code. Against this background, successful actions against concentration plans may lead to a larger number of wind turbines being erected, and hence to greater climate protection, but this may be associated with a greater burden on nature under certain circumstances. The provisions on incidental review ensure that the plan is not rescinded with *inter omnes* effect (section 47 of the Code of Administrative Court Procedure [VwGO]), and hence that the provision contained in section 35 subsection (1) number 5 subsection (3) of the Federal Building Code applies to the plan area. At the same time, however, (once the material scope of section 1 of the EAA has been expanded) it remains possible to take action against individual wind turbine projects, and where appropriate incidentally allege miscalculations which are in contravention of nature conservation at project level. The judgments which need to be handed down here however leave the application of the concentration plan unaffected (judgments only have effect *inter partes*, section 113 subsection (1) of the Code of Administrative Court Procedure), and enable the planning authorities to amend the plan in question without suffering a temporary state of "plannlessness". To put it pointedly, the rescission of wind concentration zone plans does not create greater nature conservation, but in fact less.

This equally applies to regional planning plans which for the extraction of raw materials take priority or show themselves to be particularly suitable, in particular if they linked this priority with an exclusion outside the designated areas (priority and suitable areas), as well as in all cases in which the regional policy plan contains both the identification of areas for the extraction of raw materials or for the use of wind energy, and stipulations in accordance with which areas may not be used in the interest of environmental protection or nature conservation, or may only be used in a specific manner.

The Federal Transport Infrastructure Plan defines the framework for investments in the Federation's transport infrastructure. It does not show the characteristics of a plan under the provisions contained in the law on SEAs since there are no procedural provisions for the drafting of the plan within the meaning of the case-law of the ECJ. The Federal Transport Infrastructure Plan is a political plan which is not legally preformed, and which in preparation of the improvement statutes initially establishes the need for a specific project in terms of transportation from the point of view of the Federal Government. This need is then bindingly established by the legislature in the improvement statutes and in the requirement plans that are annexed to these improvement statutes. The implementation of the respective projects with corresponding concrete stipulations takes place in the downstream planning procedure on the basis of studies carried out on various suitable routes, as well as taking the concomitant environmental impact into account. Court action may be taken against all resulting decisions in these downstream procedures.

From the point of view of the Federal Government, these specific provisions are also in compliance with the discretion for implementation which the Parties have when transposing Article 9 paragraph 3 of the Aarhus Convention (see above).

4. Paragraph 61 (d) (ii): Re section 1 subsection (1), sentence 1, number 5 of the draft Environmental Appeals Act

"An explanation of the limitations applicable to proposed section 1, subsection (1), sentence 1, number 5 of the EAA, in particular that decisions must relate to the permitting of "projects" ("Vorhaben") applying environmental legal provisions ("unter Anwendung umweltbezogener Rechtsvorschriften"). This should include clarification of whether this could potentially be interpreted so as to prevent challenges brought concerning projects, which are not subjected to permitting procedures intended to protect the environment, but may nevertheless contradict provisions of national law relating to the environment."

The Federal Government stated as follows on the term "project" (*Vorhaben*) on pages 33 et seq. (pages 37 et seq. of the English version) of the reasoning:

> "The new number 5 covers decisions on approval for other projects which do not already fall under numbers 1, 2, 2a or 2b as industrial plant or infrastructural activities. Accordingly, this primarily covers decisions in the shape of an administrative act, by means of which a project is licensed or permitted. Equally, the case constellation of omission is always directed towards the issuance of such an administrative act. It also covers public-law contracts in accordance with section 54 of the Administrative Procedure Act (*VwVfG*) which give rise to the permissibility of a project in place of an administrative act. Acts without the quality of an administrative act do not constitute a decision within the meaning of the provision.
>
> The definition of the project is orientated towards the definition contained in section 2 subsection (2) of the Environmental Impact Assessment Act, but without referring to Annex 1 of the Environmental Impact Assessment Act. It is hence possible to cover the establishment and operation of technical equipment, the construction of another installation or the implementation of another activity which encroaches on nature and on the landscape, as well as their alteration or expansion in each case. Equally, special manifestations of approval decisions under specific laws are covered in the shape of an administrative act, such as partial licences or preliminary notices. It is solely material for the delimitation in each case whether environmental provisions of federal or of *Land* law are to be applied to the decision on approval is relevant to the delimitation."

Page 34 (page 38 of the English version) of the reasoning states as follows on the term "environmental provisions":

> "Reference is made to the new section 1 subsection (4) of the Environmental Appeals Act on the specific details of the term "environmental provisions" in the terminology of Article 9 paragraph 3 of the Aarhus Convention. Accordingly, the elements of the definition of "environmental information" that is contained in section 2 subsection (3) of the Environmental Information Act are relevant, which constitutes a 1:1 transposition not only of the EU's Environmental Information Directive, but also of the underlying definition of the Aarhus Convention. Furthermore, the line of rulings of the Compliance Committee of the Convention can be used for further reviews (cf. on this the above comments on the Compliance Committee's line of rulings).

> Finally, number 5 provides that "environmental legal provisions" are those of Federal law, of *Land* law and of the directly-applicable law of the European Union. It covers all legal acts of the European Union which do not require any act of transposition under Federal or *Land* law in order to be applicable. These are EU regulations in accordance with Article 288 paragraph 2 TFEU. By contrast, directives in the case of their comprehensive transposition in German law, and the further acts named in Article 288 paragraph 1 TFEU, do not fall under number 5. In individual cases, the case-law of the ECJ on the erroneous transposition of directives, or the failure to transpose them, and the concomitant direct effect of directives, are to be taken into consideration."

The reasoning therefore makes it clear that the term "*applying environmental legal provisions"* serves to implement the corresponding wording of Article 9 paragraph 3 of the Aarhus Convention, according to which acts and omissions can be challenged *"which contravene provisions of its national law relating to the environment"*.

If the Committee presumes that the wording "applying environmental legal provisions" in section 1 subsection (1), sentence 1, number 5 of the draft Environmental Appeals Act limits the scope of the provision, this is a misunderstanding: The provision is **not** to be understood such that the wording "applying environmental legal provisions" narrows the scope of the provision to cases in which the approval decision is "intended" to protect the environment (cf. the Committee's question: "*permitting procedures **intended** to protect the environment"*). It is exclusively relevant, both according to the explicit wording and to the meaning and purpose, that the authority **has actually applied** – **or should have applied** "environmental legal provisions" in the decision in accordance with section 1 subsection (1), sentence 1, number 5 of the draft Environmental Appeals Act. The Federal Government furthermore points out that there was agreement regarding this point between all concerned during the entire legislative procedure, including the environmental associations, and that this question was not discussed in any way controversially.

With regard to the question of whether section 1 subsection (1), sentence 1, number 5 of the draft Environmental Appeals Act also covers decisions which do not constitute approval decisions, but which nonetheless might be in breach of environmental legal provisions: The opportunities to take court action exist within the framework of what was stated above. All decisions on the approval of projects with regard to which the authority has to apply environmental legal provisions are covered by section 1 subsection (1), sentence 1, number 5 of the draft Environmental Appeals Act.

5. Paragraph 61 (d) (iii): Re section 1 subsection (1), sentence 1, No. 6 of the draft Environmental Appeals Act

"*An explanation of the limitations applicable to proposed section 1 subsection (1), sentence 1, number 6 of the EAA, in particular that decisions must relate to monitoring and supervisory activities applying environmental provisions ("unter Anwendung umweltbezogener Rechtsvorschriften") and whether that requirement may be interpreted so as to possibly prevent challenges of monitoring and supervisory measures that are not intended to protect the environment."*

The Compliance Committee also requests with regard to section 1 subsection (1), sentence 1, number 6 of the draft Environmental Appeals Act first and foremost an explanation of the wording "applying environmental provisions", and enquires whether the provision may be understood and interpreted in such a way that monitoring and supervisory measures that are not intended to protect the environment are not covered by the scope of section 1 subsection (1), sentence 1, number 6 of the draft Environmental Appeals Act.

The answer to the question is **no**. The Federal Government would like to start by pointing out that the language used in section 1 subsection (1), sentence 1, number 6 of the draft Environmental Appeals Act differs slightly from that of section 1 subsection (1), sentence 1, number 5 of the draft Environmental Appeals Act. It reads as follows: " administrative acts regarding monitoring and supervisory measures (…), serving to bring about compliance with environmental provisions (…)". The versions of the provisions differ for purely linguistic reasons. This wording therefore also does not restrict the scope of the provision in the sense presumed by the Compliance Committee, but relates to the wording of Article 9 paragraph 3 of the Aarhus Convention, according to which acts and omissions can be challenged "*which contravene provisions of its national law relating to the environment*". The Federal Government furthermore refers to its elaborations on pages 11 et seq. (item 4 re section 1 subsection (1), sentence 1, number 5 of the draft Environmental Appeals Act).

The Federal Government refers to its elaborations on pages 16 et seq. re item 7 (paragraph 61(d)(v)) with regard to the question and background of the characteristic of "monitoring and supervisory measures".

6. Paragraph 61 (d) (iv): sections 63 and 64 of the Nature Conservation Act

"An explanation of the differing scope between section 63 and section 64 of the Nature Conservation Act including clarification as to whether the measures identified in paragraph 50 above would be exempted from review or instead would be reviewable under the provisions of the proposed EAA or some other provisions of national law."

Paragraph 50 reads as follows:

The Committee also welcomes the specific additions to the scope of section 64 of the Act on Nature Conservation and Landscape Management (the federal Nature Conservation Act) outlined in paragraph 23 above. The Committee has, however, not been provided with sufficient information to demonstrate that these additions would fully cover every act that may contravene provisions of German nature conservation law or otherwise that these acts would be reviewable under the regime discussed above. The Committee notes in particular the differing scope between section 63 and

section 64 of the federal Nature Conservation Act that would appear to result in the following measures being exempt from review:

- Regulations and other statutory ordinances ranking below laws in the field of nature conservation and landscape management adopted by the Federal Government or the Länder authorities,

- Landscape programmes and landscape master plans (in accordance with section 10 of the Nature Conservation Act) and landscape plans and open space structure plans (in accordance with section 11 of the federal Nature Conservation Act),

- Plans to be observed or taken into account by the public authorities when deciding on nature conservation issues (in accordance with section 36.1.2. of the federal Nature Conservation Act)

- Other procedures that are so designated under Länder law and that affect the task areas of the nature conservation organization.

Whilst section 63 of the Federal Nature Conservation Act contains provisions on the participation rights of recognised environmental and nature conservation associations in proceedings with the administrative authorities, section 64 of the Federal Nature Conservation Act regulates the representative action under nature conservation law. The provisions contained in sections 63 and 64 of the Federal Nature Conservation Act are not completely identical; the relationship between the actions available in accordance with the EAA and those of the Federal Nature Conservation Act should however also be taken into account here. The two types of action do not fundamentally rule one another out, and only with certain decisions does legal protection in accordance with the EAA take priority over that of the Federal Nature Conservation Act.

This emerges from section 1 subsection (3) of the EAA: "*To the extent that in planning approval procedures specified in [section 1] subsection (1), first sentence, no. 1 or 2 [of the EAA] appeals may be brought pursuant to this Act [to the EAA], section 64 of the Federal Nature Conservation Act shall not apply.*" The provision is furthermore to take on a slightly different version because of the statement of the Bundesrat: "To the extent that in planning approval procedures specified in [section 1] subsection (1), first sentence, no. 1 or 2 [of the EAA] appeals may be brought pursuant to this Act [to the EAA], section 64 subsection (1) of the Federal Nature Conservation Act shall not apply."

Section 64 subsection (3) of the Nature Conservation Act permits the *Länder* to also provide for appeals for nature conservation associations in other cases ("opting up"). Some of the *Länder* have made use of this possibility. There are for instance provisions in Mecklenburg-Western Pomerania regarding the protection of tree-lined avenues and nesting areas, and provisions in Berlin regarding conversion for approval in accordance with the Land Act on Forests (*Landeswaldgesetz*).

The Committee raised the question as to whether the legal acts which are named in section 63 of the Federal Nature Conservation Act, but not in section 64 subsection (1) of the Federal Nature Conservation Act, fall under the representative action under nature conservation law within the scope of the EAA.

The answer is: **Most legal acts fall within the scope of the EAA**, **the other acts are governed by general provisions of administrative procedure law**. In detail:

(1) Regulations and other statutory ordinances ranking below laws (section 63 subsection (1) number 1 and section 63 subsection (2) No. 1 of the Nature Conservation Act)

Judicial legal protection against regulations and other statutory ordinances ranking below laws is not governed by the EAA or by section 64 of the Nature Conservation Act, but by the general provisions of administrative procedure law. Accordingly, any court can incidentally declare within the judicial review of an administrative act and of its legal basis a regulation or other statutory ordinance ranking below the formal (parliamentary) statutes (such as local authority bylaws) as unlawful, and hence null and void ("competence to reject").

Moreover, subject to the prerequisites set out in section 47 of the Code of Administrative Court Procedure, a specific review of particular statutes (*prinzipale Normenkontrolle*) is also admissible against regulations and other statutory ordinances ranking below laws . In accordance with section 47 subsection (1) number 2 of the Code of Administrative Court Procedure, regulations and other statutory ordinances ranking below laws of a *Land* may be reviewed via an abstract review of statutes to the extent that this is provided in *Land* law. Most Federal *Länder* – excepting Berlin, Hamburg and North Rhine-Westphalia – have availed themselves of this regulatory possibility.

In other respects, as a matter of principle all appeals of the Code of Administrative Court Procedure, such as a general action for a declaratory judgment or application for an injunction, can be considered where subjective rights are disputed.

(2) Plans and programmes (section 63 subsection (2) numbers 2 to 3)

The plans and programmes named in section 63 subsection (2) number 2 to 4 of the Federal Nature Conservation Act fall within the scope of section 1 subsection (1), sentence 1, number 4 of the EAA where they potentially require an SEA.

The EAA applies to the plans designated in section 63 subsection (2) number 3 of the Federal Nature Conservation Act (plans within the meaning of section 36, sentence 1, number 2 of the Federal Nature Conservation Act) for actions filed by environmental associations in accordance with section 1 subsection (1), sentence 1, number 4 of the draft Environmental Appeals Act, as the plans designated in section 63 subsection (2) number 3 of the Nature Conservation Act are subject to an SEA requirement in accordance with section 14 c of the Environmental Impact Assessment Act.

With regard to the plans and programmes designated in section 63 subsection (2) number 2 of the Federal Nature Conservation Act in accordance with sections 10 and 11 of the Federal Nature Conservation Act, section 19a of the Environmental Impact Assessment Act applies to the question of the SEA requirement: In accordance with this provision, the SEA requirement for landscape planning (therefore also programmes and plans within the meaning of section 63 subsection (2) number 2 of the Federal Nature Conservation Act) is governed by *Land* law.

(3) Other procedures implementing provisions of *Land* law if *Land* law so provides

Some of the *Länder* have made use of the provision contained in section 63 subsection (2) number 8 of the Nature Conservation Act. As far as the Federal Government is aware, the *Länder* have also handed down corresponding provisions on the rights to file suit in accordance with section 64 subsection (3) of the Nature Conservation Act in these cases.

7. Paragraph 61 (d) (v): Acts and omissions of private persons

Information as to the possibilities under the EAA, or any other provisions of national law, for the public to challenge acts and omissions of private persons contravening the Party concerned's law relating to the environment

The Compliance Committee found in paragraph 52 that "[a]ll numbers in section 1, subsection (1), sentence 1 of the EAA and all subparagraphs of section 63 of the Nature Conservation Act appear to refer to acts and omissions of public authorities."

True, private persons are not explicitly named in section 1 of the EAA. Germany has nonetheless introduced a complete judicial review of the acts and activities of private persons with regard to law relating to the environment by amending the EAA: The relevant provision is section 1 subsection (1), sentence 1, number 6 of the draft Environmental Appeals Act, as well as the provision contained in section 1 subsection (1), sentence 2, of the EAA – which was already applicable under the old law –, which refers to the omission of official activities.

The reasoning states as follows on this on page 34 (page 38 of the English version):

> "The new number 6 is intended to implement the stipulation of Decision V/9h, as well as of Article 9 paragraph 3 of the Aarhus Convention, in accordance with which a judicial review must also be facilitated when environmental provisions are applied by authorities or private individuals. Since, in accordance with the outcome of the compliance proceedings which have been carried out against Germany, direct appeals under civil law against private individuals are insufficient for the transposition of this stipulation of Article 9 paragraph 3 of the Aarhus Convention in conformity with international law, an administrative court appeal must be made available. In accordance with the traditional understanding of German administrative law, which is to be retained, only appeals against an authority can hence be considered here which are to be carried out for monitoring, or for another supervisory activity, so that a state can be safeguarded, or where necessary brought about, which is in conformity with environmental law.
>
> **It is unnecessary to explicitly mention private individuals in the wording of the Act because official monitoring and supervisory measures always constitute state encroachments on the relationship with citizens and legal entities and take place within the framework of administrative proceedings**

within the meaning of section 9 of the Administrative Procedure Act[2]. Parties which are concerned by these official monitoring and supervisory measures can therefore be natural or legal entities within the meaning of section 11 of the Administrative Procedure Act[3].

For reasons of determinedness, the wording of the new number 6 connects to the term "administrative act" within the meaning of section 35 of the Administrative Procedure Act. Accordingly, the subject-matter of the appeal must always be an act or omission on the part of the authority in the shape of an administrative act, and hence have an external impact. […]" [emphasis only here].

The legislative technique has the following background: If a private person might violate law relating to the environment when implementing or enacting a decision in accordance with section 1 subsection (1), sentence 1, numbers 1 to 5 of the draft Environmental Appeals Act, environmental associations will be able to initiate administrative proceedings in future. These proceedings are intended to ensure that the authority intervenes against or monitors the private individual; the authority acts here as a monitoring and supervisory authority. The legal foundations for such intervention are the existing provisions on intervention in the specific legislation, or in terms of subsidiarity, the general clauses contained in regulatory law. If the authority takes such a monitoring or supervisory decision, the environmental association may refer to the potential breach of law relating to the environment and lodge an appeal and, should it not be remedied within the proceedings in the administrative authority, may file suit in accordance with section 1 subsection (1), sentence 1, number 6 of the draft Environmental Appeals Act. Should the authority not have taken a monitoring or supervisory measure in contradistinction to the statement of the environmental association, the environmental association may claim with its appeal that the authority had omitted to carry out a measure in accordance with section 1 subsection (1), sentence 1, number 6 of the draft Environmental Appeals Act. Section 1 subsection (1), sentence 2, explicitly opens the scope of the EAA for cases of omission.

In the view of the Federal Government, this legal protection is particularly effective since environmental associations are able to give rise to intervention against private persons on the part of the State by initiating administrative proceedings. The authority can also enforce compliance with an order by means of administrative execution.

The provision contained in section 1 subsection (1), sentence 1, number 6 of the draft Environmental Appeals Act furthermore includes within its scope those cases in which private persons act in breach of provisions of nature conservation law. A separate provision in the Federal Nature Conservation Act is therefore superfluous (cf. remark by the Committee in paragraph 52).

---

[2] Section 9 of the Administrative Procedure Act reads as follows: "The administrative procedure within the meaning of the present Act shall be deemed to be the external activity of the authorities intended to ensure the review of the prerequisites for, the preparation of and the issuance of an administrative act or the conclusion of a public-law contract; it shall comprise the issuance of the administrative act or the conclusion of the public-law contract."

[3] Section 11 of the Administrative Procedure Act reads as follows: "The following shall be deemed eligible to participate in the procedure

1. natural and legal persons,
2. associations insofar as they may be entitled to a right,
3. authorities."

The Federal Government points out that private persons and environmental associations have both this possibility, which has been newly created for environmental associations, to take action before the administrative authorities and courts, as well as and in particular to take civil action against private persons who might have violated environmental legal provisions (cf. on this already Germany's statements in compliance proceedings ACCC/C/2008/31, in particular the statement of 25 July 2011, pp. 18 et seqq.).

8. Paragraph 54: Request by the Committee for a more detailed explanation with regard to the implementation of Article 9 paragraph 3 of the Aarhus Convention

The Committee stated as follows in paragraph 54:

"To be able to evaluate if the "Aarhus" amendment would nevertheless fully meet the requirements of paragraph 2(b) of decision V/9h, the Committee will need a more detailed explanation of which acts and omissions by private persons and public authorities that could contravene the provisions of the Party concerned's national law relating to the environment would be covered by the proposed provisions, which possibly not, and for what reasons. The explanation should take into account the concerns raised by the Committee in the preceding paragraphs."

In order to implement decision V/9h, number 1(b), the Federal Government proposed in its Government draft to broaden the scope of section 1 subsection (1), sentence 1, numbers 4 to 6 of the EAA, as well as section 64 subsection (1) of the Nature Conservation Act. As far as the Federal Government is aware, the German Bundestag will shortly be adopting the Act unamended with regard to these provisions. As is customary in German legislative practice, the material provisions determine in abstract terms the prerequisites so that the provision becomes applicable when they are satisfied.

The Federal Government asks the Committee to understand that the requested detailed explanation of which specific acts and omissions will constitute acts and omissions that are subject to judicial review within the meaning of Article 9 paragraph 3 of the Aarhus Convention in accordance with German law in future cannot be provided.

The reasoning of the draft EAA also does not contain such a list of the decisions covered by the scope of the material provisions. According to an understanding of good legislation, the abstract norms stand for themselves; their concrete application in individual cases is left to the legal practitioners concerned (environmental associations and authorities), and the review of this application is a matter for the courts. The only exception found in the reasoning refers to section 1 subsection (1), sentence 1, number 4 of the draft EAA on page 32 (page 35 of the English version) of the reasoning, which makes it clear by way of an example: „Amongst other things, […] also covers development plans (land use plans and zoning plans)…".

An large but undetermined – and undeterminable – number of decisions by administrative authorities and omissions of such decisions from a wide variety of diverse fields of specific German law will be covered by the scope of the provisions in future. There is no list of these decisions on the part of administrative authorities, and no such list can be drawn up given the large number of provisions affected.

III. Summary

Germany has remedied the breaches of international law found in decision V/9h of the fifth session of the Meeting of the Parties through the "Draft Act Aligning the Environmental Appeals Act and other provisions to Stipulations of European and International Law", which is expected to come into force shortly. German law is hence in complete compliance with the provisions of the UN ECE Aarhus Convention.