

Second progress report by the German government on the implementation of Decision V/9h concerning compliance by Germany with its obligations under the UN ECE Aarhus Convention

I. Introduction

Decision V/9h was adopted at the 5th session of the Meeting of the Parties to the UN ECE Aarhus Convention, which took place from 30 June to 2 July 2014 in Maastricht. This decision endorsed the findings of the Compliance Committee with regard to communication ACCC/C/2008/31 and recommends 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."

In addition, Germany was invited to periodically submit to the Compliance Committee reports on the progress of the implementation of these recommendations (the first by 31 December 2014, with subsequent reports on 31 October 2015 and 31 October 2016), so that the Committee can present a compliance review report to the sixth session of the Meeting of the Parties in 2017.

The Federal Republic of Germany hereby submits the second progress report on the implementation of Decision V/9h in accordance with the given deadline.

II. Current situation

1. The Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety drew up a "draft Act adapting the Environmental Appeals Act and other provisions to European and international law" and started coordination of this draft within the German government in mid-March 2015.

This draft act contains proposals for legislative amendments to German law to implement both recommendations pursuant to paragraph (2), letters (a) and (b) of Decision V/9h.

The German government's consultations are still ongoing. The start of consultations with the Länder and associations, publication of the draft act and subsequent adoption of the new draft by the Cabinet (incorporating the results of the consultations) is currently scheduled for the end of December 2015/beginning of January 2016.

There is, however, an element of uncertainty regarding this schedule: in the context of access to justice on environmental matters, it is planned to address other issues in the draft act. This applies in particular to the ongoing infringement procedure against the Federal Republic of Germany in the European Court of Justice concerning case C-137/14. The ECJ will announce its judgment on 15 October 2015. The contents of this judgment will determine whether and on what scale the current draft act will have to be revised.

2. We also submit the following comments:
 - a) In our first report we gave notification of a draft act transposing Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (known as the Seveso III Directive, Official Journal L 197 of 24 July 2012, page 1) into German law.

Consultations were held on this draft act with the Länder and associations in the period May to June 2015, and the draft was published. It contains an Article 3, which amends the Environmental Appeals Act and extends the catalogue of the act's scope by two

categories of possible subjects of appeal (see the excerpt from the consultation draft in [Annex 1](#)). This planned amendment implements Article 23b of the Seveso III Directive. The draft is currently being revised to incorporate the results of the consultations. Adoption by the German government is scheduled for autumn 2015.

- b) Additionally, on 12 August 2015 the German government adopted the “draft Act amending the Environmental Appeals Act to implement the judgment of the European Court of Justice of 7 November 2013 on case C-72/12”.

The sole purpose of this draft act is to implement the ECJ judgment referred to in the title. Amendments are planned to sections 4 and 5 of the Environmental Appeals Act (see excerpt from the government draft in [Annex 2](#)).

The draft act’s covering note contains the following explanation:

“Regarding further amendments to the Environment Appeals Act, especially in view of Decision V/9h by the fifth session of the Meeting of the Parties to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) of 2 July 2014, consultations will be held subsequently in a special legislative procedure.”

On 25 September 2015 the German Bundesrat presented its opinion - which was fundamentally positive - on this draft act amending the Environmental Appeals Act to implement the judgment of the European Court of Justice of 7 November 2013 on case C-72/12. The first reading in the German Bundestag took place on 24 September 2015. The act is expected to enter into force in November 2015.

The Federal Republic of Germany will submit its next progress report - as requested - by 31 October 2016.

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Excerpt from the German government's consultation draft act (as at 26 May 2015):

Non-binding translation for information purposes

Draft act transposing the Directive on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC

Article 3

Amending the Environmental Appeals Act

In section 1 subsection (1), first sentence, of the Environmental Appeals Act in the version promulgated on 8 April 2013 (Federal Law Gazette I, page 753), amended by section 2 subsection (52) of the Act of 7 August 2013 (Federal Law Gazette I, page 3154), the following numbers 2a and 2b shall be inserted after number 2:

"2a. Licences for installations pursuant to section 23a subsection (4), first sentence, or section 19 subsection (4) of the Federal Immission Control Act;

2b. Decisions concerning the admissibility of projects that are to be carried out within the safety clearance of an establishment pursuant to section 3 subsection (5a) of the Federal Immission Control Act and require authorisation according to provisions under Land law."

Excerpt from the German government's draft act (as at 12 August 2015):

Non-binding translation for information purposes

Draft act amending the Environmental Appeals Act to implement the judgment of the European Court of Justice of 7 November 2013 on case C-72/12

Article 1

Amending the Environmental Appeals Act

The Environmental Appeals Act in the version promulgated on 8 April 2013 (Federal Law Gazette I, page 753), amended by section 2 subsection (52) of the Act of 7 August 2013 (Federal Law Gazette I, page 3154) shall be amended as follows:

1. Section 4 shall be amended as follows:

a) Subsection (1) shall be replaced by the following subsections (1) to (1b):

“(1) The reversal of a decision on the admissibility of a project pursuant to section 1 subsection (1), first sentence, numbers 1 and 2, can be requested if

1. a) an environmental impact assessment or

b) a preliminary assessment of the individual case concerning the requirement for an environmental impact assessment

required in accordance with the Environmental Impact Assessment Act, the Ordinance on the Assessment of the Environmental Impacts of Mining Projects, or the corresponding statutory provisions of the *Länder* was not carried out, and was not carried out at a later stage,

2. the necessary public participation within the meaning of section 9 of the Environmental Impact Assessment Act or within the meaning of section 10 of the Federal Immission Control Act was not carried out, and was not carried out at a later stage, or

3. another procedural error occurs that

a) has not been remedied,

b) is comparable in type and scale with the cases listed in numbers 1 and 2 and

c) has denied the affected public the opportunity for legally prescribed participation in the decision-making process; participation in the decision-making process also includes access to documentation that has to be made available to the public.

A preliminary assessment of the individual case concerning the requirement for an environmental impact assessment that does not satisfy the benchmark of section 3a, fourth sentence, of the

Environmental Impact Assessment Act shall be equivalent to not carrying out a preliminary assessment pursuant to the first sentence, number 1, letter b.

(1a) Section 46 of the Administrative Procedures Act shall apply to procedural errors that do not fall within the scope of subsection (1). Where it is not possible for a court to ascertain whether a procedural error pursuant to the first sentence influenced the decision, such influence shall be assumed.

(1b) The following provisions shall remain unaffected:

1. section 45 subsection (2) of the Administrative Procedures Act,
2. section 75 subsection (1a) of the Administrative Procedures Act and other corresponding provisions having the effect of maintaining plans in force and
3. the possibility of suspending court proceedings to remedy a procedural error."

b) In subsection (2), the words "notwithstanding subsection (1)" shall be replaced by the words "notwithstanding subsections (1) to (1b)".

c) Subsection (3) shall be amended as follows:

aa) The words "subsections (1) and (2)" shall be replaced by the words "subsections (1) to (2)".

bb) The following sentence shall be inserted:

"Subsection (1), first sentence, number 3, shall be applied subject to the proviso that the reversal of a decision may only be requested if the procedural error has denied the parties concerned the opportunity for legally prescribed participation in the decision-making process."

2. Section 5 shall be amended as follows:

a) Subsection (1) shall read as follows:

"(1) This act shall apply to appeals against decisions pursuant to section 1 subsection (1), first sentence, numbers 1 and 2, that were taken or that should have been taken after 25 June 2005. Notwithstanding the first sentence, section 4a subsection (1) shall only be applied to such appeals referred to in the first sentence that are brought after 28 January 2013."

b) Subsection (4) shall be repealed.