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Unser Zeichen
95A/05-WB/jb

Datum
15. April 2015

**Communication to the Aarhus Compliance Committee
ACCC/C/2015/125**

**Consideration of preliminary admissibility: Communicant's
response to comments of the Party concerned**

Dear Ms Marshall,

1. We acknowledge the receipt of your letter dated 14 April 2015. This letter indicates that, having considered the preliminary admissibility of communication ACCC/C/2015/125 at its forty-eight meeting, having heard the views of the Party concerned and the communicant via audio-conference as well as observers present at the meeting, and having *'taken into account the written comments received from the Party concerned, the European Union and the United Kingdom,'* the Committee determined that the Communication was inadmissible under paragraph 20 (d) of the annex to decision I/7 for not being compatible with the provisions of the Convention and that decision. We note that the Committee's reasoning will only be provided in the report of the Committee's forty-ninth meeting (30 June – 3 July 2015). Therefore we take the liberty of considering the Committee's determination to be preliminary in nature and of submitting at this time on behalf of the Communicant a written rebuttal of the points raised by the Party concerned in its written comments.

BAUMANN RECHTSANWÄLTE
Partnerschaftsgesellschaft mbB

Partnerschaftsregister Nr. PR 90,
AG Würzburg

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2. On pp. 1 – 4 of its written comments, the Party concerned contests the admissibility of the communication on the grounds that the communicant is a 'public authority' and that the Convention's definition of the terms 'member of the public' and 'public authority' are mutually exclusive.
3. In response to these arguments we would firstly like to emphasize that, even though German municipalities do have governmental functions at the local level, they at the same time are 'legal persons' within the meaning of Article 2, paragraph 4 of the Convention.
4. Section 1, subsection 2, clause 1 of the Rhineland-Palatinate Municipal Code, Law and Ordinance Gazette 1994, p. 153 (*Rheinland-pfälzische Gemeindeordnung, GVBl. 1994, 153*), expressly provides that '*[m]unicipalities are territorial corporations.*'
5. Further, under German law municipalities are capable of suing and being sued, capable of holding property, and capable of entering into contracts. German municipalities, by virtue of the constitutional guarantee of local self-government pursuant to Article 28, paragraph 2, clause 1 of the Basic Law, also have an individual public law right in relation to other public bodies. This enables municipalities to challenge decisions of other public authorities (see, e.g., Federal Administrative Court, 2000 *Neue Zeitschrift fuer Verwaltungsrecht*, 675), e.g. decisions for the approval of projects having a significant impact on the environment.
6. For these reasons, municipalities have the characteristics of a 'legal person' and thus come under the definition of 'the public' set out in Article 2, paragraph 4 of the Convention. This definition reads:

"The public' means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups[.]"

7. Secondly, as regards the argument that the Convention's definitions of the terms 'public authority' and 'the public' are mutually exclusive, we quite disagree for the following reasons:

Firstly, on their terms, the definitions set out in Article 2, paragraphs 2 and 4 of the Convention obviously overlap to some extent: Whereas any 'legal persons' can be members of 'the public' within the meaning of Article 2, paragraph 4, specific categories of legal persons can be 'public authorities' within the meaning of article 2, paragraph 2, clauses (b) and (c) of the Convention.

Secondly and more importantly, we believe that it depends on the context whether a particular entity should for purposes of the Convention be considered a member of 'the public' or a 'public authority'. For instance, a municipality like the Communicant may well be a 'public authority' in the context of a request for environmental information submitted to it in

accordance with national provisions implementing Article 4 of the Convention. However, in the context of challenging major environmental projects such as the planning approval decision for the construction of a flood retention scheme on the Upper Rhine, the communicant must be considered a member of 'the public concerned'.

Thirdly, the reference of the Party concerned to the Implementation Guide is misplaced. Indeed, the Implementation Guide provides indirect support for the Communicant's view that the application of the Convention to specific entities depends on the context in which the entities concerned are operating: On page 48, the Implementation Guide states that *'it would seem that a single body may fall under this definition [i.e. the definition of 'public authority' set out in Article 2, paragraph 2, clause (b)] with respect to a part of its activities while other of its activities will be of a private nature.'*

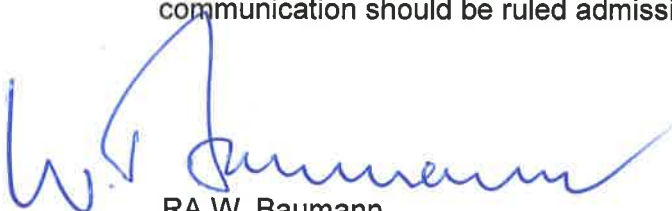
Fourthly, there are good reasons of policy to regard as a member of 'the public' a German municipality such as the Communicant who is considered to be *'the foundation and simultaneously an element of the democratic state'* and expressly *'called upon to promote the welfare of its inhabitants'* (section 1, subsection 1 of the Municipal Code). The Communicant's statutory role as the foundation of the democratic state in combination with its task of promoting the welfare of its inhabitants implies that the Communicant represents the interests of its inhabitants, in particular in the context of holding other decision-making bodies to account for their environmental decisions. Thus the position of the Communicant is similar to that of 'groups' or 'associations' of natural persons who expressly are included in the Convention's definition of 'the public'. Also, municipalities frequently with regard to funding, readily available expert staff, and resources will be better placed than individuals to bring meaningful challenges to environmental decision-making. For this reason, the Committee should consider municipalities to be members of 'the public', so as to better *'contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'* and thus to promote the Convention's purpose as set out in its Article 1.

8. Further, the reliance of the Party concerned on the Committee's findings with regard to communication ACCC/C/2013/97 is misplaced. It is true that the Committee ruled that communication inadmissible on the grounds that it had been submitted by an organ of the state. However, the 2013/97 ruling can be distinguished from the present communication for the following reasons: Communication ACCC/C/2013/97 had been brought by the Upper Austrian Environmental Attorney General (Oberösterreichischer Umweltanwalt) whose functions solely relate to the enforcement of environmental law. By contrast, the present Communicant is a legal person within the meaning of Article 2, paragraph 4 of the Convention.

9. Indeed, there is support in the Committee's previous case-law for the Communicant's view that municipalities must be considered members of the public: Communication ACCC/C/2009/39 had been brought by the Hungarian municipality of Szentgotthard. Whereas the Committee ultimately considered the communication inadmissible for being manifestly unreasonable, at no point in its deliberations did the Committee – and, for that matter, the Party concerned – take issue with the then communicant being a municipality.
10. Lastly, there are precedents in EU law and in German domestic law for the view that municipalities are entitled to enforce provisions which – in a similar manner as the Convention – relate to access to justice and to fair administrative and judicial procedures. The Court of Justice of the European Union has held that municipalities are 'legal persons' within the meaning of Article 263, paragraph 4 of the Treaty on the Functioning of the European Union and for this reason entitled to bring an action for annulment (Case 222/83, judgment of 11 July 1984, *Municipality of Differdange v. Commission*). The Federal Constitutional Court has consistently held (see, e.g., Federal Constitutional Court, 18 BVerfGE 447; 68 BVerfGE 205 *et seq.*; 75 BVerfGE 197) that municipalities, despite having public functions, are holders of the procedural fundamental rights of access to the statutorily determined judge (Article 101, paragraph 1, clause 2 of the Basic Law) and to a fair hearing in court (Article 103, paragraph 1 of the Basic Law). Thus the Committee would be in accordance with international practice as regards enforcing rights of access to justice and to procedural fairness, should it hold that municipalities are members of 'the public' within the meaning of Article 2, paragraph 4, and Article 15 of the Convention and of paragraph 18 of the Annex to Decision I/7.
11. On pages 4 –5 of its submission, the German government claims that the Communicant has not exhausted its domestic remedies, since it at present is involved in litigation about the Upper Rhine flood retention scheme. We believe that this claim is without merit. Whereas it is true that the Communicant continues to challenge the planning approval decision for the flood retention scheme in the domestic courts, the domestic case and the present Communication have different subject-matters. The domestic case is about the legality under domestic and EU law of the planning approval decision for the flood retention scheme. By contrast, the present Communication is concerned with the compatibility of German administrative and procedural law with the Convention.
12. On page 6 of its submission, the German government points to the pending enforcement proceeding (Case C-137/14 – *Commission v. Germany*) which considers the compatibility of the preclusion regime with EU law. We do not share the German government's belief that this pending case constitutes a suitable domestic remedy which the Communicant should have exhausted prior to submitting a communication to the Committee. This is because Article 9, paragraph 4 of the Convention goes further than the relevant EU

Directives in that this provision of the Convention expressly requires judicial review procedures to be fair and to provide for effective remedies.

13. Assuming for a moment that the pending enforcement proceeding is a suitable domestic remedy, it is nevertheless submitted that the Communicant did exhaust this remedy. This is because it was the Communicant who provided much of the information the European Commission used for purposes of the enforcement proceeding. Indeed, the European Commission gratefully acknowledged that the Communicant had provided a large volume of very useful information (please refer to the letter of the European Commission, DG Environment, of 26 April 2013 – **Appendix**).
14. Also, Germany has consistently implemented EU judgments about access to justice in environmental matters in a reactive, minimalist, grudging manner. For these reasons, litigation in the Court of Justice is not an 'effective and sufficient means of redress' within the meaning of paragraph 21 of the Annex to Decision I/7.
15. At the hearing on 27 March 2015, the representative of the German government pointed to recourse to the Federal Constitutional Court as a further avenue of domestic redress for the Communicant. We believe that this argument lacks merit. This is because the Federal Constitutional Court will not consider the compatibility of German law with the Convention, since German courts do not regard the Convention as self-executing. Also, the Federal Constitutional Court has held that the preclusion regime is compatible with the Basic Law (62 BVerfGE 81). Thus recourse to the Federal Constitutional Court cannot be considered an 'effective and sufficient means of redress' within the meaning of paragraph 21 of the Annex to Decision I/7.
16. For the reasons stated above, the Communicant believes that the present communication should be ruled admissible.



RA W. Baumann

Accredited Administrative Law Specialist
(on behalf of Professor Christian Heitsch)

Appendix

Letter from the European Commission, DG Environment, of 26 April 2013 (German original and English translation)



EUROPÄISCHE KOMMISSION

GENERALDIREKTION

UMWELT

Direktion A - Rechtliche Angelegenheiten und Kohäsion

ENV.A.2 - Förderung der Einhaltung von Vorschriften, Governance und rechtliche Fragen

26 AVR. 2013

Brüssel, den
CHAP(2012)3156

EINGEGANGEN

7. MAI 2013 16

BAUMANIN
RECHTSANWÄLTE

Frau Rain Franziska Heß
Baumann Rechtsanwälte
Annastraße 28
97072 Würzburg
DEUTSCHLAND

Sehr geehrter Frau Heß,

ich beziehe mich auf Ihre Beschwerde vom 23. Oktober 2012 im Namen der Gemeindeverwaltung Altrip wegen der Verletzung des Artikels 10a der Richtlinie 85/337/EWG durch die Präklusionsvorschriften im deutschen Recht, die unter dem Aktenzeichen CHAP(2012)3165 registriert wurde.

In Ihrer Beschwerde beschreiben Sie die einschlägigen deutschen Rechtsvorschriften und deren Anwendung durch deutsche Gerichte und argumentieren, dass diese dem Unionsrecht widersprechen.

Dazu möchte ich Ihnen mitteilen, dass die Kommission bereits ein Vertragsverletzungsverfahren gegen die Bundesrepublik Deutschland wegen der fehlerhaften Umsetzung der Bestimmungen über den Zugang zu Gerichten nach Artikel 11 der Richtlinie 2011/92/EU (welche die Richtlinie 85/337/EWG ersetzt) und Artikel 25 der Richtlinie 2010/75/EU eingeleitet hat. Dieses Verfahren betrifft auch die im deutschen Recht geltenden Präklusionsregeln. Ich danke Ihnen für die umfangreichen Informationen zu dieser Frage, welche in dem laufenden Verfahren mitberücksichtigt werden. Da in Bezug auf die in Ihrer Beschwerde vorgebrachte Rechtsverletzung ein Vertragsverletzungsverfahren bereits läuft, wird Ihre Beschwerde nicht weiter verfolgt werden.

Bevor der Fall eingestellt wird, möchte ich Ihnen Gelegenheit geben, sich binnen eines Monates dazu zu äußern.

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Mit freundlichen Grüßen,


Liam Cashman
Stellvertretender Referatsleiter

Translation of the letter from the European Commission to Mrs Franziska Heß, Baumann
Rechtsanwälte, Annastraße 28, 97072 Würzburg, dated 26 April 2013:

Dear Mrs Hess,

I refer to the complaint you submitted on 23 October 2012 on behalf of Altrip municipality, which alleges that the German preclusion regime breaches Article 10a of Directive 85/337/EEC, and which has been registered as file number CHAP(2012)3165.

In your complaint you explain the relevant provisions of German law and their application by the German judiciary and argue that they contravene EU law.

In this regard, I would like to inform you that the Commission has already initiated an enforcement proceeding against the Federal Republic of Germany for the flawed transposition of the provisions on access to justice pursuant to Article 11 of Directive 2011/92/EU (which replaces Directive 85/337/EU) and to Article 25 of Directive 2010/75/EU. This proceeding also deals with the preclusion provisions applicable in German law. I would like to express my gratitude to you for the voluminous information about this issue, which will be introduced in the pending proceeding. Since an enforcement proceeding already is pending with regard to the breaches of the law you raised in your complaint, we will not pursue this complaint further.

Prior to closing the file, I would like to offer you an opportunity to comment within one month.

Sincerely

Liam Cashman

Deputy Head of Division